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No. 91-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TEMPLE OF THE LOST SHEEP INC., a/k/a Action Committee to Help the Homeless Now and HENRY JEROME MACKEY, a/k/a Jerome Mackey,

Petitioners,

—v.—

ROBERT ABRAMS, Attorney General of the State of New York, NEW YORK NEWS, INC., JACK NEWFIELD, JOHN DAVIS, and THOMAS WHELAN, and JILL LAURIE GOODMAN,

Respondents,

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. May a federal plaintiff preserve his federal claims under the "England" doctrine in a case in which "Younger" abstention has been applied?

2. Does the Due Process Clause permit a federal plaintiff to be compelled to litigate federal claims not at issue in State Court, in a state forum, in which the state is a defendant ?

3. Does the Due Process clause permit the District Court to collaterally estop a federal plaintiff from litigating federal claims that he chose not to litigate in a demonstrably biased state forum ?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

OPINIONS BELOW

This petition seeks review of a decision of the United States Court of Appeals for the Second Circuit, which is reported as *Temple of the Lost Sheep, a/k/a Action Committee to Help the Homeless Now, and Henry Jerome Mackey v. Robert Abrams, Attorney General of the State of New York, New York News, Inc., Jack Newfield, John Davis, Thomas Whelan and Jill Laurie Goodman* 930 F.2nd 178 (2d Cir. 1991) (per Feinberg, W., Timbers, W., and Miner, R.,), and reprinted in the Appendix to the Petition for Certiorari, infra. at App.1, 261.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit from which review is sought was entered on April 5, 1991. That decision affirmed the judgment of the United States District Court for the Eastern District of New York, dismissing petitioners' complaint. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

No person . . .shall be . . . deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case involves the plight of a church to secure a hearing in federal court to redress constitutional deprivations alleged to have been brought on by a conspiracy between a state and a newspaper.

Petitioners hold it to be unconscionable that a federal plaintiff, alleging § 1983 violations, could have been compelled to adjudicate his claims in a State Court Special Proceeding in which there was no oral argument, discovery, fact

finding, or trial, and where petitioners' § 1983 complaint alleged bias against the specific forum into which a federal judge compelled petitioners to be thrust.

The District Court dismissed the petitioners' claims arising under 42 U.S.C. § 1983 because a subsequent State Court proceeding had resolved against petitioners issues central to those claims, and alternatively, as against the state defendants, those claims were barred by qualified immunity. The District Court also found that petitioners' claims arising under 42 U.S.C. Section 1985(3) failed to state a claim under Fed. R. Civ. P. 12(b)(6). The Court then dismissed the remaining state-law claims for lack of subject matter jurisdiction.

At issue in this petition is not the facts the respondents purport to have established, but the process - including the choice of trubunal in which petitioners' federal claims are alleged to have been adjudicated - by which the respondents, and in particular the State, obtained the result it sought. To set in context the violations of fairness and religious freedom claimed by petitioners, requires only the following exposition of the record.

A. HOW THE STATE ATTORNEY GENERAL WAS ABLE TO CIRCUMVENT PETITIONERS' DISTRICT COURT ACTION

In the fall of 1988. the Temple of the Lost Sheep Inc., a/k/a the Action Committee to Help the Homeless Now, (the Church) expelled respondents John Davis and Thomas Whelan from the organization for breaking Church rules (i.e. drinking, taking drugs, and stealing). When they left, they professed their intention to get revenge against the petitioners. They contacted respondent Jack Newfield, a writer for the New York Daily News (the News). Therefrom, a conspiracy with the New York State Attorney General (the "State" or the "A.G.") was conceived in which the end result would be to assert State control over the homeless shelter run by the Church, spin off the religious element therefrom, and to assert charges against petitioner Henry Jerome Mackey (Mackey) personally. To achieve this result, the News and State, in tandem, would issue a series of derrogatory news articles about the petitioners, and issue subpoenas to the Church and

its members, in an attempt to give credence to the articles and create a public outcry against the petitioners. It was hoped that these actions would scatter the Church's membership, induce additional dissatisfied members to testify against the Church's controlling hierarchy, and produce actual complainants from members of the public who had financially supported the Church over the years. At that time, the State actually had not one single public complainant against the Church, nor has it produced a single bona fide complainant, since.

Shortly thereafter, Mackey received a telephone call from an ex-Church member who claimed he had been questioned by the State, and sought to divulge details and information about the State investigation in return for a fee. Mackey rejected the offer as an extortion attempt. Thereafter, the News contacted Mackey, misrepresenting their true intentions, and requesting pictures and information about the finances of the shelter. Because of their misrepresentation, Mackey cooperated with the News by answering directly questions put to him about the finances of the Church, and posing for and supplying the pictures requested. Thereafter, the first of a series of derrogatory articles was published by the News, and the State served subpoenas upon the Church, Mackey, and other members of the Church. In 1980, 1983, and 1985, the State had previously sought to subpoena Church members and documents without justification, and without complainants. In each instance, petitioners informed the State of its abuse of authority.

On December 22, 1988, petitioners commenced this lawsuit in the Eastern District of New York, by way of Order to Show Cause, alleging various violations of their constitutional rights under U.S.C. § 1983 and a conspiracy to violate their rights under § 1985(3). (App.1, 227) The petitioners requested a declaratory judgment on the extent of the State's ability to subpoena a Church's books and records and members without some showing of wrongdoing on the part of the Church or its members; petitioners challenged State authority to grant the A.G. such a power or the A.G.'s userpation of such power. Secondly, petitioners requested a preliminary injunction against the News, enjoining them from continuing to write clearly untrue statements about the petitioners, and to

publish retractions of the untruths already published, and enjoining the State from issuing subpoenas to the Church and its members without some showing of wrongdoing on the part of the petitioners. Finally, petitioners sought compensatory and punative damages for the alleged constitutional deprivations.

Without responding timely to petitioners' Order to Show Cause, the State started a subsequent "Special Proceeding" in New York State Supreme Court to compel compliance with subpoenas. The State then served the State Court papers on the petitioners and Judge Raggi, only minutes before the oral arguments in the District Court. The State, based upon the just served papers, then requested that the District Court abstain from hearing petitioners' claims. On at least three previous occasions, the State had sought to subpoena petitioners' books and records, and its members, and such request had been rebutted by the petitioners. In theory, those subpoenas had not been complied with. In this instance, however, the State sought judicial relief after only three weeks because the State could see the seriousness of the Federal Court litigation.

At the oral argument, the State requested that the District Court abstain from hearing petitioners' claims based upon the just commenced State action. Petitioners' original complaint alleged that the State Courts represented a demonstrably biased forum in its prior decisions relating to the petitioners.[1]

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1 12/20/77 A.G. sought and received money judgment against Mackey from New York Supreme Court Justice Martin B. Stecher, without a trial, and based upon 15 counts in which Mackey had been adjudged innocent in a federal trial.

1/9/80, New York Supreme Court Justice Bernard Nadel granted an order of contempt against Mackey for non payment of the 12/20/77 judgment,upon recommendation of special referee Florence Belsky Esq., even though an "automatic stay" was in effect resulting from Mackey's bankruptcy petition, and the State had been notified of the stay on 4/9/79.

With full knowledge that a federal bankruptcy stay was in effect, on 1/28/80 the State opposed Mackey's appeal of money judgment to Appellate Division: First Department, and the Appellate Division upheld said Order of Contempt.

State declined to oppose discharge of the debt in Bankruptcy Court, but 6 months after the debt had been discharged in bankruptcy, on 6/19/81, the State moved to incarcerate Mackey for contempt.

The State repeatedly subpoenaed books and records of the Church on its own volition, without a single bona fide complainant. (App. 1, 233)

In response to Judge Raggi's inquiry, the State reluctantly admitted that it had no complainants from the public at large, nor did the State possess a single sworn statement alleging misconduct by petitioners (App.1, 148, line 22). Nonetheless, Judge Raggi denied petitioners' request for preliminary injunction and indicated her inclination to abstain from hearing the case based on *Younger v. Harris*, 401 U.S. 37 (1971). Because the State had surprised petitioners with the subsequent State action, petitioners informed Judge Raggi of their intention to amend their complaint.

The Petitioners were required by the New York State Civil Practice Law and Rules (CPLR) to respond to the State's petition. On the return date for the State's motion to compel compliance with the subpoenas, the petitioners submitted papers requesting the New York State Supreme Court to Quash the Subpoenas, Stay, or Dismiss the Petition because of the instant federal court litigation (App. 1, 87). Petitioners also attached a copy of their federal complaint to show the existence of their federal claims then pending before the District Court. Since it was the State's petition and they had not requested oral argument, the petitioners were not entitled to oral argument on the motion to compel compliance with subpoenas. The petitioners intentionallty avoided raising their federal conspiracy claims in the State Court so as to reserve them for determination in the District Court under the doctrine of *England v. Louisiana State Board of Medical Examiners* 375 U.S. 411.

Because of Judge Raggi's inclination to abstain from hearing the case, and the State's subsequent action, the petitioners were willing to accept state adjudication of the narrow issue of "compliance with the subpoenas". Petitioners, thereafter, amended their complaint in the District Court and dropped their request for a declaratory judgment, so that the petitioners would no longer be seeking equitable relief, in the expectation that abstention would not then be appropriate under *Younger*.

In June 1989, Judge Raggi nonetheless granted respondents' motion and stayed this action pending the conclusion of the subsequent State Court proceeding. Thereafter, the petitioners moved for Judge Raggi's recusal on the ground that

she was biased.[2] Judge Raggi denied petitioners' motion for recusal and petitioners appealed from that order and also sought a Writ of Mandamus to compel Judge Raggi to recuse herself. The Second Circuit Court of Appeals dismissed the appeal and denied petitioners' petition for a mandamus.

Petitioners, thereafter, moved in State Court by order to show cause, to prevent Justice Greenfield from making any decision concerning petitioners' federal claim of conspiracy. Said order to show cause was denied.[3] Petitioners then moved in the New York State Supreme Court Appellate Division:First Department (Appellate Division) for a review of Judge Greenfield's ambivalent position. The Appellate Division requested that petitioners withdraw their request for appellate review without prejudice on the ground that the issue was premature. Petitioners accordingly complied with the request of the Appellate Division.

B. HOW RESPONDENTS OBTAINED THE COLLATERAL ESTOPPEL EFFECTS OF THE STATE COURT PROCEEDING

In January 1990, Justice Greenfield ruled on the motions before him, granting the A.G.'s motion to compel compliance with the subpoenas and denying the petitioners' cross-motions. Petitioners filed a timely notice of appeal with the

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2 Prior to her appointment as a Federal judge, 95% of the trial experience of Judge Raggi, had been in the capacity of a prosecutor which gave rise to a question concerning her interest in the outcome of the case.
Immediately prior to the commencement of this case, the District Court Judge had spent seven of the previous ten years employed as an Assistant U.S. Attorney or the U.S. Attorney, and was married to an executive assistant U.S. Attorney employed by the Southern District of New York. Appellants' Complaint sought to hold state prosecutors personally liable for their misconduct. Should a District Court jury have found the defendants personally liable after a trial, that decision could have had an adverse effect on the District Court Judge herself, and her husband, placing them both at risk. That risk was known by the judge from the beginning of the case and constituted "an interest that could be substantially affected by the outcome of the proceeding." Thus Judge Raggi was required, but failed to disqualify herself at the outcome of the case pursuant to 28 U.S.C. § 455(a)&(b). Nor did she inform petitioners of her interest in the outcome of the case.
In *U.S. v. Pepper and Potter Inc.*, D.C. N.Y. (1988) 677 F. Supp. 123, 125, the District Court Judge concluded that his limited earlier involvement when he was United States Attorney required his disqualification under § 455 (a) because there could be an appearance of partiality.

3 The reasons set forth by Justice Greenfield for his failure to sign petitioners' Order to Show Cause dated 6/29/89 were : "1. Atty. Gen. not notified 2. Ct. will not be barred from considering whatever is appropriate for decision". (App.1, 216)

Appellate Division. Petitioners thereafter returned to the Eastern District Court and moved to vacate Judge Raggi's order staying the federal proceedings. Judge Spatt, to whom the case had been reassigned, found that the state court action had been concluded but would not allow petitioners to proceed with the case until the uncertainty of the petitioners' state court notice of appeal had been resolved. A two week adjournment was thereby granted for petitioners to withdraw their state court notice of appeal. Since it was petitioners' position that the state court decision in no way limited their conspiracy claims in the federal court proceeding, the petitioners withdrew their notice of appeal, and fully complied with the subpoenas. Upon returning to the District Court, Judge Spatt granted petitioners' motion to vacate Judge Raggi's previous order. Subsequently, the respondents moved to dismiss the federal complaint. In September, 1990, Judge Spatt granted respondents' motion on the ground that the petitioners were collaterally estopped from pursuing their claims arising under 42 U.S.C. § 1983 because of Judge Greenfield's decision, and alternatively as against the State, those claims were barred by qualified immunity; petitioners' claim arisisng under 42 U.S.C. § 1985(3) failed to state a claim and there was lack of subject matter jurisdiction for petitioners' remaining state law claims.

C. HOW THE COURT OF APPEALS AFFIRMED THE DISMISSAL

The Court of Appeals recognized that the petitioners had raised troubling issues regarding the combined use of *Younger* abstention and the doctrine of "Collateral Estoppel". It nonetheless rejected all of the petitioners' principle claims. The Court of Appeals determined that the *England* doctrine can only be applied in *Pullman* type abstention cases. As to the Collateral Estoppel effect of Judge Greenfield's Order, the Court of Appeals concluded that petitioners placed the conspiracy allegations directly at issue in the State Court proceedings and had the opportunity to litigate those claims in State Court. Finally, the Court of Appeals held that they did not need to reach the alternate ground of qualified immunity, and summarily agreed that the petitioners failed to state a 1985(3) claim.

SUMMARY OF ARGUMENT

Certiorari should be granted because, in at least three related respects, courts below violated not only Fifth Amendment principles, but also elementary notions of fairness in the rules of law;

First, Judge Raggi made the improper conclusion that the allegedly conclusive conduct engaged in by the private defendants with the A.G. was at issue in the State Court Special Proceeding to compel compliance with subpoenas.

Second, Judge Greenfield, when approached to determine the existence or non existence of petitioners' federal conspiracy claims in the State Court proceeding, declined to be definitive.

Third, contrary to the most basic principles of due process forbidding collateral estoppel effect unless issues are clearly determined, Judge Spatt and the Court of Appeals improperly concluded that Justice Greenfield had resolved petitioners' federal conspiracy claims against petitioners, although no such mention was expressed in Judge Greenfield's order.

REASONS FOR GRANTING THE PETITION

I. A FEDERAL PLAINTIFF MAY PRESERVE HIS FEDERAL CLAIMS UNDER THE *ENGLAND* DOCTRINE WHEN A DISTRICT COURT ABSTAINS UNDER *YOUNGER*

The Court of Appeals erroneously concluded that there are fundamental differences between *Railroad Commission v. Pullman Co.*312 U.S. 496 (1941) abstention and *Younger* abstention, sufficient enough to negate the application of preservation of rights under *England* in all *Younger* abstention cases. The petitioners disagree.

This Court, in *England*, ruled that federal plaintiffs could have reserved their federal claims, and thereby avoid preclusion by informing the State Court that they intended to return to Federal Court to pursue their federal claims should the State Court rule against them on the question of state law. In that case the court abstained under the doctrine of *Pullman*.

The case at bar is similar to *Pullman* and almost identical to *England*. Petitioners believe that they were entitled, under *England*, to preserve their federal conspiracy claims and did in fact take the necessary steps to preserve those claims. Here, the petitioners had original federal court jurisdiction, had not previously litigated any of their claims in state court, and were required to submit their state claims to adjudication in the subsequent state proceeding. Petitioners objected to being forced to adjudicate their federal and state law claims relative to the subpoenas in the subsequent State Court Special Proceeding, as indicated in the initial oral argument before Judge Raggi. [4] Judge Raggi made no indication at either oral argument that she was attempting to force petitioners to litigate their conspiracy claim in State Court as well. Had she done so, petitioners would have protested in a like manner.

The Court of Appeals, in reaching its conclusion that the petitioners could not reserve their federal claims in District Court, relied on the pre-supposition that petitioners' § 1983 conspiracy claim was before Justice Greenfield. How could that issue get before Justice Greenfield? Certainly the State did not put it at issue by the filing of its initial petition. Thus, the issue could only be placed there by peitioners' responsive motion papers, dated December 19, 1988, or Judge Raggi's Memorandum and Order, dated June 7, 1989. (App. 1, 106). The Court of Appeals assert that petitioners sought to preserve all of their federal claims. The petitioners did not make such

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4 "THE COURT : So it's clear to me that no proceedings of substance have yet occured in this court. On the other hand, the state has now gone into the State Court and sought to have the injunction enforced, or to have the subpoena enforced.
You'll have an opportunity to raise all of your objections to that subpoena before a State Court judge.
There's no reason to think a State Court judge won't honor the First Amendment, as well as I. Is there?
MR. ROBERSON : Yes, there is, ma'am, the reason so as indicated in our papers, the whole basis of this complaint has been repeated common plan and scheme over a period of time.
THE COURT : Are you saying that the New York State courts are participants in this scheme as well as the Attorney General?
MR. ROBERSON : What we're saying specifically is that the Attorney General has been able to, however it may be, be able to go beyond federal laws, and which is clearly indicated by what happened in the federal bankruptcy case. You had a federal bankruptcy stay which was violated."
(App. 1, 141)

a claim. Rather, petitioners only claim to have preserved their § 1983 conspiracy claim. Petitioners are not arguing that the State Court does not have the authority to resolve federal constitutional questions, but rather that it can only determine those issues that are properly before it. The District Court case involved two basic issues: 1. The conspiracy between the respondents, and 2. The question of the A.G.'s statutory authority to issue the subpoenas. The Special Proceeding in State Court specifically dealt with the latter. Therefore, *Younger* abstention correctly granted the State Court the ability to resolve all federal constitutional questions directly pertaining to the A.G.'s statutory authority to issue the subpoenas. Justice Greenfield did that in his order. Petitioners are not claiming that they preserved their federal claims relative to the subpoenas. However, petitioners do aver that they preserved their federal conspiracy claims, an issue that was not before the State Court.

The petitioners' federal § 1983 conspiracy claim was not raised in State Court by the pleadings of the petitioners. Petitioners were required by the CPLR to respond to the A.G.'s petition, and were required by *Government Employees v. Windsor*, 353 U.S. 364, to inform the State Court what their federal claims were, so that the state claims could be construed "in light of" the federal claims. In filing their State Court cross-motions, petitioners intentionally avoided placing the issue of conspiracy before the State Court for adjudication so as to preserve that issue in the District Court under *England*. Subsequent to the filing of their state court cross-motions, petitioners submitted a copy of their federal pleadings, with all exhibits and affidavits, to Judge Greenfield to enable him to see the full scope of petitioners' federal claims. Petitioners' disclosures pursuant to *Windsor* were made solely and exclusively for the purpose of informing the State Court of the full extent of its then pending federal conspiracy claims.

Judge Raggi's Order erroneously concluded that the issue of conspiracy was also in the State Court for adjudication, along with the validity of the subpoenas. The petitioners challenge Judge Raggi's ability to place their § 1983 conspiracy claim in issue in the State Court Special Proceeding, as more fully outlined below. When Judge Raggi made that

ruling, petitioners immediately moved in State Court to challenge Justice Greenfield's subject matter jurisdiction over their federal conspiracy claims. These acts by the petitioner, when combined, preserved their federal § 1983 conspiracy claims. Judge Greenfield did adjudicate petitioners' constitutional claims relative to the validity of the subpoenas, but declined to rule on the issue of conspiracy.

Judge Raggi's Order was, in certain respects, an abstention under *Pullman*. While it is true that the subsequent Special Proceeding in State Court involved important state interests that might have provided petitioners with an adequate opportunity for judicial review, it is equally true that the petitioners' Federal Court action challenged the A.G.'s ability to issue subpoenas in this instance and challenged the statutory authority (the New York State statute) which empowered the A.G. to do so. The State Court Special Proceeding, as defined in *Pullman*, therefore involved an inquiry focused on the possibility that the State Court might interpret the challenge to the statutory authority so as to eliminate, or at least alter materially, the constitutional question presented. Judge Raggi's Order clearly noted this point when it stated : "The Court will not address defendants' remaining challenges to plaintiffs' claims until the state proceeding concludes, since the decision in that case may very well modify, if not dispose of, certain of the claims raised here." (App. 1, 127) Judge Raggi's Order contemplated petitioners' return to federal court to litigate their conspiracy claims against the Daily News defendants. Thus it is clear that Judge Raggi did not contemplate the outright dismissal of the federal suit and the presentation of all claims both state and federal before the state court, rather she merely postponed the federal jurisdiction, as is the case in *Pullman* abstentions.

The rationale for allowing reservation of a federal claim in a state court proceeding following a *Pullman* abstention is applicable to the case at bar. Whether Judge Raggi had abstained under *Pullman* or *Younger* would in no way have affected the subsequent state court proceeding. The respondents made a motion for Judge Raggi to abstain and she granted their motion. It was the respondents that made the request for *Younger* abstention. It is inconceivable that a

federal plaintiff can reserve his rights under *England* if the court abstains under *Pullman*, but can't reserve his federal rights if the court abstains under *Younger*, and that the label for such determination can be set forth by the hands of the respondents. There is currently no label for an abstention containing both *Younger* and *Pullman* type characteristics.

The right of a federal plaintiff to choose a federal forum where there is a choice, cannot be denied. Nothing in *Younger* abstention requires or supports such a result. Abstention, whether *Pullman* or *Younger*, "is a judge-fashioned vehicle for according appropriate deference to the respective competence of the state and federal court systems."

II. THE DUE PROCESS CLAUSE DOES NOT PERMIT A FEDERAL PLAINTIFF TO BE COMPELLED TO LITIGATE HIS FEDERAL § 1983 CLAIMS, NOT AT ISSUE INSTATE COURT, IN A BIASED STATE FORUM, IN WHICH THE STATE IS A DEFENDANT.

The existence or non-existence of a conspiracy between the respondents was a factual determination which could only have been established at a trial. Petitioners' § 1983 claim could not have been accidentally placed at issue in the state court merely by the petitioners' informing the State Court of their pending District Court litigation. Assuming, *arguendo*, that petitioners' § 1983 claim had inadvertently been placd in the State Court by the petitioners, Justice Greenfield could not have made the factual determination of the existence of the alleged conspiracy without joining the News as a party to the State Court proceeding, as required by CPLR 1001(b), and conducting a trial on the issue as required by CPLR section 410

Judge Raggi, in her Memorandum and Order dated June 7, 1989, attempted to compel petitioners to adjudicate their federal § 1983 claims in the State Court Special Proceeding, by stating that the issues were there when in fact they clearly were not. As noted above, petitioners were compelled under *Windsor* to disclose the existence of its Federal Court action against the A.G. and others for conspiracy. The fact that petitioners disclosed to the State Court its pending District

Court litigation, was interpreted by Judge Raggi to be the equivalent of raising the conspiracy issue for litigation in the state forum. Petitioners disagree.

An issue arises as to whether the petitioners would have been able to expand the scope of the State Court Special Proceeding to litigate their federal conspiracy claims. The State Court Special Proceeding was limited to one issue: whether or not the State could compel the Church to comply with State issued subpoenas. Furthermore, at no time did any party to the State Court Special Proceeding attempt to join another party as a third-party defendant, a necessary element before the issue of conspiracy could have been adjudicated in that forum.

The question then becomes whether it would have been in the petitioners' interest to expand the scope of the Special Proceeding to litigate their conspiracy issues in the state court. In order to do so, petitioners would have had to have clearly given up their right to litigate their federal conspiracy claim in federal court and litigate the same in a forum they knew to be biased; something it was not in the interest of petitioners to do. Further, petitioners would have had to assume an inferior position, accept a limited ability to discover, become a defendant as opposed to a plaintiff, and be unable to recover damages in an amount determined by a jury.

Petitioners charged the A.G. with conspiracy to deprive constitutionally protected freedoms. The A.G. has repeatedly been able to achieve same in the state forum, only because he received cooperation from New York State judges. New York judgeships are politically sponsored, elected, and appointed, and the office of the New York State Attorney General is a political office. That coincidence creates a climate of collusion, and at a trial, New York State judges would have had very little incentive to allow the exposition of the very nepotismic relationships upon which the livelihood of their associates depended. While it was not petitioners' intention to show disrespect to New York State judges, in the past, some have clearly chosen to close their eyes to the law in order to grant the constitutionally violative motions set before them by the A.G.. Petitioners' amended complaint sets forth ample evidence that the A.G. is capable of performing every illegal

act he is supposed to protect the public against, and has repeatedly demonstrated his ability to deprive petitioners of freedoms secured by the constitution, with the full cooperation of numerous different State Court judges.

As evidence to this point, if the A.G. were honest and confident of his position, he would have been more than willing to have a fair trial in federal court. The reason he so desperately opposed the district court's hearing of this case, goes far beyond simply doing his job. At the heart of the issue was the A.G.'s fear that, in federal court, he would lose and be exposed for his henious crimes whereas in state court, because of his political clout, and petitioners'limited ability to discover, he was almost assured of winning.

The District Court was under an unflagging obligation to view the petitioners' complaint in the light most favorable to the petitioners. However, when confronted with the A.G.'s subsequent State Court Proceeding and a request to abstain, Judge Raggi clearly abdicated her obligation and viewed the evidence in the light most favorable to the respondents.

Abstention is the exception and not the rule, is justified only in limited circumstances, and is generally not favored in § 1983 actions because it would frustrate the purpose of § 1983 actions. [5] In the case at bar, the District Court's abstention frustrated petitioners' § 1983 action. The Court of Appeals, in the face of noted case law to the contrary, ruled that the petitioners were collaterally estopped with respect to their § 1983 claims which could have been, but were not, raised in the State Court Special Proceeding.

Judge Greenfield specifically rejected the notion that conspiracy had been properly placed before him and further outlined the constitutional claims that petitioners had raised

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5 *Bailey v Patterson* (1962) 369 US 31,7 L Ed 512,82 S St 549; *Zwickler v Koota* (1967) 389 US 241, 19 L Ed 2nd 444,88 S Ct 391. *Brown v Bronstein* (1975, SDNY) 389 F Supp 1328. *Donohoe Constr. Co v Maryland-National Capital Park & Planning Com.* (1975, DC Md) 389 F Supp 21. 5th *Circuit-Moreno v Henckel* (1970, CA5 Tex) 431 F2d 1299, 2 BNA FEP Cas 1009. *Douglas Research & Chemical Inc. v Solomon* (1975, ED Mich) 388 F Supp 433, *Stradley v Andersen* (1972, CA 8 Neb) 456, F2nd 1063.)

in state court. [6] Judge Greenfield's Decision and Order further set forth the context in which the petitioners' federal pleadings were received [7]

The Court of Appeals, citing *Steffel* 415 U.S. at 460-61, stated that "a pending state proceeding, in all but unusual cases, would provide a federal plaintiff with the necessary vehicle for vindicating his constitutional rights. . ." What would cause a case to be unusual ? The fact that the petitioners brought a § 1983 action ? The fact that the State was a defendant with a well documented history of bias against petitioners ? The fact that petitioners alleged from the beginning that they could not get a fair trial in state court?

The Court of Appeals punished the petitioners for their failure to litigate their § 1983 action in the context of the Special Proceeding. The issue remains whether the petitioners could have been compelled, against their will, to litigate their federal § 1983 claims in a biased forum, or lose the right to do so. An affirmative answer to this issue, seems unconscionable. This Court, in *England*, held that there are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a State Court's determination of those claims. This Court further held that a federal plaintiff may not be unwillingly deprived of the primary fact determination that would have been by the District Court.

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6 "She [Judge Raggi] further found that the State Court could properly address the Constitutional claims of respondents [petitioners] with respect to privacy, free association, freedom of religion and the right against self incrimination." (App.1, 132)

7 "In opposition to the motion of the Attorney General and in support of the cross-motion by Mackey and the Temple, respondents [petitioners] submit the complaint and amended complaint in the Federal action together with a short affirmation of counsel for the Temple. In addition, respondents [petitioners] submit two affidavits of present members of the Temple who not only attack the character of the two former members of the Temple who have occasioned the Attorney General's investigation, but also detail certain conversations with those two former members to support respondents' [petitioners'] allegations of a conspiracy between the Attorney General and the Daily News to either shut down the shelter, or in the alternative, to take over the shelter from Mackey and operate it as a city-run facility." (App.1, 133 last paragraph)

III. THE DUE PROCESS CLAUSE DOES NOT PERMIT A DISTRICT COURT TO COLLATERALLY ESTOP A FEDERAL PLAINTIFF WHO CHOOSES NOT TO LITIGATE HIS § 1983 FEDERAL CLAIMS IN A DEMONSTRABLY BIASED STATE FORUM.

This Court held in *Montana v. U.S.* 99 S.Ct 970 (1979), that the following three part test is to be applied to cases involving the application of the doctrine of "collateral estoppel" : (1) the issues must be identical, (2) there must be a full and fair opportunity to litigate the claims, (3) there is no equitable reason why collateral estoppel should not be applied.

The respondents take the position that Justice Greenfield's determination that the subpoenas were statutorily valid, and that the A.G. was not acting in "bad faith" relative thereto, is equivalent to a ruling that there was no conspiracy between the respondents. Let us analyze this logic and uncover the erroneous underpinnings. Would the converse of that logic still hold true ?

If Justice Greenfield had ruled that the A.G. either lacked authority to issue the subpoenas, or was acting in bad faith, would the News be collaterally estopped from denying that there was a conspiracy between the respondents ? Such a conclusion could not in all fairness be made against the News since they were not a party to the State Court Special Proceeding and had no ability to contravert any factual determination that took place there. Therefore, it is clear that for there to have been a factual determination of the existence of a conspiracy, the News would have had to have been joined as a party to the proceeding. The fact that Justice Greenfield did not join the News as a party, did not have a trial on the issue of conspiracy, and did not explicitly discuss conspiracy in his order, can only lead one to conclude that he did not render a determination about the factual existence of a conspiracy between the respondents. It is equally clear that the A.G. could have had the statutory authority to issue subpoenas to the Church, and still have participated in a § 1983 conspiracy to deprive petitioners' constitutional rights.

The issues to be decided in the District Court were not identical to the issues decided in State Court.

"For a question to have been actually litigated, so as to

satisfy the identicality requirement under *Schwartz v Public Adm'r. of County of Bronx*, (24 N.Y. 2d 65, 71, 298 NY Sup. 2d. 955, 246 NE 2d, 725) it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding. Petitioners' § 1983 and § 1985(3) conspiracy claims were not raised in state court. Accordingly, petitioners' federal § 1985(3) and § 1983 conspiracy claims to be decided by the District Court are not identical to the issues that were decided by Justice Greenfield since the petitioners' federal conspiracy claims were not raised in State Court by the parties in their pleadings, nor were they otherwise placed in issue and actually determined by Justice Greenfield.

The District Court and the Court of Appeals, read into Judge Greenfields opinion, something that did not exist by concluding that he must have first determined the issue of conspiracy adversely to petitioners in order to compel compliance with the subpoenas. Such a determination is pure speculation. To be sure, Judge Greenfield explicitely avoided ruling on or discussing conspiracy. Due process requires that ambiguous readings be determined in the light most favorable to petitioners. In that respect, petitioners were denied due process.

Judge Greenfield's order did not address and did not need to address petitioners' § 1983 claim in order to resolve the issues that had been presented to him. Justice Greenfield clearly indicated that point when he stated :

> ". . . it is not necessary for this court to discuss and determine the overlapping of the two actions and whether the resolution of the Federal action will be dispositive of this proceeding to compel compliance with the subpoena. . . ." (App.1, 137 first paragraph)

The character and effect of a conspiracy are to be judged, not by dismembering it and viewing its separate parts, but only by looking at it as a whole, and, in regarding the conspiracy in this manner, if acts which are lawful in essence are bound together as parts of a single plan, the plan may make the parts unlawful. [8] Therefore, the character and effect of the con-

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8 *Montague & Co v Lowry* (1904) 193 US 38,48 L Ed 608, 24 S Ct 307; *United States v Patten* (1913) 226 US 525, 57 L Ed. 333, 33 S Ct 141; *Swift & Co v United States* (1905) 196 US 375, 49 L Ed 518, 25 S Ct 276; *United States v Reading Co.* (1912) 226 US 324, 57 L Ed 243,33 S Ct 90 mod on other grounds 228 US 158,57 L Ed 779,33 S Ct 509; *Bedford Cut StoneCo v Journeymen Stone Cutters' Asso.* (1927)

spiracy to deprive plaintiffs' constitutional rights alleged in the case at bar, are to be judged, not by dismembering it and viewing the separate acts of the A.G. and the News, but only by looking at them as a whole. Whether the individual acts of the defendants are illegal or actionable, is of no consequence, if the requisite elements are present to spell out a 42 USC § 1983 action. The main focus in a common law conspiracy action is on the *mens rea* element. In a § 1983 action, however, the statute requires the plaintiffs to show damages caused by the conspiracy.

The respondents committed acts in furtherance of the conspiracy more than just the issuance of the subpoenas. To the extent petitioners are able to show that the respondents conspired with an invideous discriminatory intent, for the purpose of depriving petitioners of equal protection of the law or equal privileges and immunities under the law, that one of the respondents committed an act in furtherance of the conspiracy, and that petitioners were deprived of their rights as a result of that conspiracy, the independent catagorization or classification of the acts of the respondents is irrelevant. The conspiracy alleged by petitioners included a common plan and scheme which included numerous illegal acts by the A.G. and other co-conspirators spanning a period of 20 years. For the District Court and the Court of Appeals to rule that the single act of issuing the subpoenas, assuming its legality, precluded the possibile illegality of any of the other acts alleged, without discovery or trial, violated due process. No determination was ever made concerning the other illegal acts complained of by the petitioners.

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274 US 37, 71 L Ed 916, 47 S Ct 522, 54 ARL 791 (superseded by statute as stated in *Jacksonville Bulk Terminals, Inc., v International Longshoremen's Asso.* 457 US 702, 73 L Ed. 2d 327, 102 S Ct 2673, 110 BNA LRRM 2665, 94 CCHLC § 13582); *America Tobacco Co v United States* (1946) 328 US 781, 90 L Ed 1575, 66 S Ct 1125; *Maryland & Virginia Milk Producers Asso. v United States* (1960) 362 US 458, 4 L Ed 2d 880, 80 S Ct 847; *United States v General Motors Corp* (1966) 384 US 127, 16 L Ed 2d 415, 86 S Ct 1321, 1966 *CCH Trade Cases* §71750, 10 FR Serv 2d 1245; *Monarch Tobacco Works v American Tobacco Co.* (1908, CC Ky) 165 F 774; *Louisiana Farmers' Protective Union, Inc. v Great Atlantic & Pacific Tea Co.* (1942, CA8 Ark) 131 F 2s 419; *United States v New York Great Atlantic & Pacific Tea Co* (1943. CA5 tex) 137 F 2d 459, cert den 320 US 783, 88 L Ed 471, 64 S Ct 191; *United States v Bausch & Lomb Optical Co.* (1943, DC NY) 3 FRD 331. 61 USPQ 86; *United States v General Dyestuff Corp.* (1944, DC NY) 57 F Supp 642; *First Delaware Valley Citizens Television Inc. v CBS Inc.* (1975, ED Pa) 398 F Supp 925, 1975.

Based on the Court of Appeals' definition of conspiracy, a conspirator would not be guilty unless an illegal act was in fact committed. Under that theory, a defendant would never be guilty of conspiracy even if he wanted to and attempted to commit a crime, but was unsuccessful. We know that this is not the case.

For sure it can be said that the petitioners did not have a full and fair opportunity to litigate their federal § 1983 and § 1985 claims in the State Court Special Proceeding. As noted above, the petitioners demonstrated the existence of a biased state forum, in addition to the fact that the scope of the Special Proceeding was limited.

Article 4, Section 410 of the CPLR dealing with Special Proceedings provides that

> "if triable issues of fact are raised, they shall be tried forthwith and the Court shall make a final determination thereon. If issues are triable of right by a jury, the Court shall give the parties an opportunity to demand a jury trial of such issues . . . ."

Article 41 Section 4101 of the CPLR provides that

> "in the following actions, the issues of facts shall be tried by a jury unless a jury trial is waived
>
> . . . (3) any other action in which a party is entitled by the Constitution or by express provision of law to a trial by jury."

Petitioners were entitled to a jury trial on their federal Conspiracy claims because it had been so requested in the District Court.

If Justice Greenfield had believed that the issue of conspiracy was before him, he was obligated under CPLR Article 4 Section 410 to inform petitioners of their right to demand a jury trial. Since Justice Greenfield did not inform petitioners that there would be a trial on the issue of conspiracy, it is clear that that issue was not before the court.

At every stage of the proceedings, petitioners were summarily barred from all forms of fact finding either by law or judicial determination. Pursuant to CPLR 3214(b), no fact

finding, discovery, oral argument, or trial was ever had in the State Court Special Proceeding. In fact, Judge Greenfield clearly set forth certain limitations that he perceived to exist.[9] Thus it can be said that petitioners did not receive a full opportunity to litigate their federal conspiracy claims.

For equitable reasons, the petitioners should not have been collaterally estopped from litigating their § 1983 and § 1985 federal claims in the District Court.

Res Judicata does not apply to suits under 42 USC § 1983 with respect to claims that could have been but were not raised in a prior state suit. *Williams v Sclafani* (1977, SD NY) 444 F.Supp. 895. While 42 USC § 1983 does not permit a plaintiff to relitigate constitutional claims actually determined in a prior state court proceeding, the prior state court proceeding does not bar federal court consideration of constitutional claims which were not actually litigated or determined in that proceeding. *Camarano v N.Y.* (1984, SD NY) 577 F.Supp. 18.

A judgment in a State Court proceeding which is simply an appeal from an administrative determination, limited under state law to determination of whether the administrative decision was supported by competent, substantial evidence on record taken as whole, does not preclude the subsequent 42 USC § 1983 Federal Court claim arising from the same set of facts. *Huron Valley Hospital Inc. v Pontiac* (1985, ED Mich.) 612 F.Supp. 654. The prior State Court affirmance of a State Adminstrative ruling does not preclude raising, in the subsequent Federal Civil Rights action, issues which were not and could not be raised in the state litigation. *Casines v Murchek* (1985, C.A. 11 Fla.) 766 F.2d. 1494.

A finding by a state court judge at a preliminary hearing that probable cause existed to proceed on a disorderly conduct charge against plaintiff in a later civil-rights action under 42 USC § 1983 was not the same issue as whether the police officer could have reasonably believed that the plaintiff was

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9 "It is not the function of the court at this stage to weigh the credibility of the complaint made by the former members of the Temple as against the affidavits of the two present members of the Temple which question their character and motives." *Abrams v Temple of the Lost Sheep Inc.*
(App.1, 135, 2nd paragraph)

committing disorderly conduct and the the arrest was therefore in bad faith, and since the disorderly conduct charge was never prosecuted, plaintiff in later civil-rights action was not allowed to present evidence for cross examination of witnesses at probable cause hearing and did not have full and fair opportunity to litigate probable cause issue, so that the constitutional claims relating thereto were not barred by collateral estoppel. *Bailey v Andrews* (1987 C.A. 7 Indiana) 811 F 2d. 366.

It is an established rule that the judgment in a prior action does not operate as an estoppel to a second action as to matters not litigated in the former action, where the second action is upon a different claim, demand, or cause of action. *Re Nicholas's Estate*, 144 W. Va. 116, 107 S.E. 2d. 53, 82 ALR 2d 868. Such is the case at Bar. The state court proceedings were special in nature and the sole purpose was to give judicial approval to said subpoenas. This rule is particularly applicable where the issue involved in the later action was not subject to litigation in the prior action.[10] As noted above, the issues of conspiracy and equal protection were never addressed in the Special Proceedings.

Collateral estoppel is not applicable where the nature of the prior action is restricted or the matter was not within the issues as they were made or tendered by the pleadings in the prior action, or the non-existence then of the matter involved[11] As in the case at Bar, the mere fact that evidence was introduced with respect to a matter which was not at issue, does not preclude the assertion of such matter in a subsequent action. *Laconia National Bank v Lavallee*, 96 N.H. 353, 77A 2d 107. As noted above, the state court proceedings were limited in

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10 *Burtnett v. King* 33 Cal. 2d 805, 205 P 2d 657, 12 ALR 2d 333; *Nash v. Gardner*, 232 S.C. 215, 101 S.E. 2d 283; *Davis V. First National Bank*, 139 Tex. 36, 161 S.W. 2d 467, 144 ALR 1; *Piro v. Piro* (Tex. Civ. App) 349 S.W. 2d 626; *Hagen V. Hagen*, 205 Va. 791, 139 S.E. 2d 821, 23 ALR 3d 619.

11 Ash Sheet Co. V. United States 252 U.S. 159 64 L. Ed. 507, 40 S.Ct. 241; *Wagner v. Baren* (Fla) 64 S. 2d 267, 37 ALR 2d 831; *East Mill Creek Water Co. v. Salt Lake City*, 108 Utah 315, 159 P 2d 863; *Angel v Bullington*, 330 U.S. 183, 91 L.Ed. 832, 67 S.Ct. 657; *Durham v Crawford*, 196 Ga. 381, 26 S.E. 2d. 778; *Bristow v Lang*, 221 Iowa 904, 266 N.W. 808; *Powell v Bailey*, (Ky) 376 S.W. 2d 532; *Canon v. Canon*, 223 N.C. 664, 28 S.E. 2d 240; *Kemp v. Miller*, 166 Va. 661, 186 S.E. 99; *Lorillard v Clyde*, 122 N.Y. 41, 25 N.E. 292; *Tax Lein Co. v Schultze*, 213 N.Y. 9, 106 N.E. 751 rehearing denied 213 N.Y. 700, 108 N.E. 1109.

scope, did not involve any discovery, and never addressed the issues of conspiracy or equal protection.

The District Court and the Court of Appeals erred in ruling that petitioners are collaterally estopped from litigating their federal conspiracy claims because they could have been raised in the prior State Court Special Proceeding. To hold that petitioners are now collaterally estopped from proceeding in federal court punishes petitioners for seeking to pursue their statutory right to federal court jurisdiction. Furthermore, petitioners would have been unfairly punished by being forced into a posture of defendants as opposed to plaintiffs, and severely limiting their scope of discovery and ability to recover damages.

CONCLUSION

When the Second Circuit decision is considered in light of the history, policy, and law which have been documented in the foregoing pages, it seem clear that the court misconstrued the context in which this case should have been viewed. As a consequence, the court greviously misread the applicable law, violating petitioners' rights to due process and equal protection.

To permit such extrordinary results without plenary review by this Court would be troublesome, even if it could safely be predicted that what befell these petitioners would not befall others. Clarification of rights between church, state, and freedom of the press is badly needed.

For these and all the foregoing reasons, petitioners accordingly pray that a Writ of Certiorari issue so that such review may take place.

Respectfully Submitted,

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91-214

No. 91-(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TEMPLE OF THE LOST SHEEP INC., a/k/a Action Committee to Help the Homeless Now and HENRY JEROME MACKEY, a/k/a Jerome Mackey,

Petitioners,

—v.—

ROBERT ABRAMS, Attorney General of the State of New York, NEW YORK NEWS, INC., JACK NEWFIELD, JOHN DAVIS, and THOMAS WHELAN, and JILL LAURIE GOODMAN,

Respondents,

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Page

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TEMPLE OF THE LOST SHEEP INC., A/K/A ACTION COMMITTEE TO HELP THE HOMELESS NOW, and HENRY JEROME MACKEY, pro se,

MEMORANDUM DECISION AND ORDER

Plaintiffs,

CV-88-3675(ADS)

-against-

ROBERT ABRAMS, Attorney General of the State of New York, ROBERT ABRAMS, JILL LAURIE GOODMAN, NEW YORK NEWS, INC., JACK NEWFIELD, JOHN DAVIS, and THOMAS WHELAN,

Defendants,

----------x

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SPATT, District Judge.

Although several challenges are raised by these motions to dismiss, the Court finds that the primary issue presented here is as follows: does a state court decision upholding the validity of a subpoena issued by the State Attorney General, have collateral estoppel effect on a civil rights action against the Attorney General and others which is based primarily upon the Attorney General's issuance of the subpoena in connection with an investigation of possible fraudulent activities? The resolution of this issue is further complicated by reason of a determination of abstention that another Judge of this Court ordered while the motions dealing with the subpoena were pending in state court. For the reasons that follow, this Court finds that the First and Fourteenth Amendment constitutional claims raised here, either actually were or could have been raised in state court, and therefore the doctrine of collateral estoppel applies to preclude re-litigation of the issues raised here. The Court also finds that the claims based upon conspiracy in violation of 42 U.S.C. § 1985(3),

fail to state a claim upon which relief may be granted, and must also be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Finally, in view of these determinations, the plaintiffs' remaining state-law claim must likewise be dismissed.

FACTUAL BACKGROUND

A detailed description of the factual background surrounding this action is succinctly set forth in Judge Reena Raggi's Memorandum and Order in *Temple of the Lost Sheep Inc. v. Abrams*, CV-88-3675, slip op. at pp. 3-14 (E.D.N.Y. June 7, 1989), which recitation is familiar to all parties and counsel. Set forth below is a summary of the facts stated in the plaintiff's complaint relevant to the instant motions.[1]

The Temple of the Lost Sheep Inc. a/k/a Action Committee to Help the Homeless Now ("Temple"), is an entity that operated as an unincorporated religious society from approximately 1960 to 1980. Henry Jerome Mackey ("Mackey") has been affiliated with the organization since its inception, and, in 1979 he participated in its incorporation pursuant to New York's Religious Corporation Law.

The Temple maintains a shelter for the homeless in Flushing, Queens, New York. One of its stated objectives is "to provide a haven wherein persons who believe themselves to be 'Lost Souls' may find a temporary refuge, during which time they may seek their own Spiritual regeneration through prayer, and the study of the Bible and other religious works" (Second Amended Complaint, paragraph 2). As a condition of membership, and as part of their religious activity, the members are required to "solicit alms from the donating public" by taking part in begging (*id.*). Most of the money received each day is turned over to Mackey and the Temple. According to the plaintiffs, "[b]y so doing, the members are able to solve their own problems by experiencing God's blessings" (*id.*).

Footnote 1: As a part of their Second Amended Complaint, the plaintiffs have attached and incorporated by reference, numerous affidavits, newspaper articles, correspondence, subpoenas and other documents. Pursuant to Fed. R. Civ. P. 10(c), all of that material is considered a part of the complaint "for all purposes".

The defendants John Davis ("Davis") and Thomas Whelan ("Whelan"), are homeless persons who were originally admitted to the Temple shelter in 1988, but who later defected from the organization.

The defendant New York News Inc. is the publisher of the *Daily News* newspaper ("Daily News"). The defendant Jack Newfield ("Newfield"), is a staff writer and regular columnist for the Daily News.

When Davis and Whelan left the shelter, they contacted reporter Newfield of the Daily News and advised him that the Temple required its members to go out and "beg" as a condition to staying in the shelter, and that the proceeds were turned over to Mackey. Newfield thereafter arranged a meeting with the Attorney General of the State of New York ("Attorney General"), to have Davis and Whelan report their story to that office for possible investigation.

On October 20, 1988 and November 2, 1988, the Attorney General, through Assistant Attorney General Jill Laurie Goodman, issued subpoenas to be served on several "John Doe" Temple members in support of an administrative investigation into their activities. On October 21, 1988, another subpoena was served on Mackey, directing his appearance on November 2, 1988. The subpoena also called for the production of books, records and other Temple documents. The purpose of the subpoenas was to determine whether further proceedings should be brought pursuant to various provisions of New York's Business Corporations Law, General Business Law, Executive Law, Not-For-Profit Corporations Law, and Estate, Powers and Trusts Law. Specifically, the Attorney General alleged that he was investigating the possibility of fraud under the guise of charitable activity.

In the interim, on October 24, 1988, Newfield wrote a story which ran in the Daily News on the Temple's activities and the investigation (*see* Second Amended Complaint, Exhibit "T"). In particular, Newfield recounted Mackey's criminal past, described the Temple's operations and reported

about the experiences of Davis and Whelan and the plaintiffs. He also reported about Mackey's personal wealth, despite Mackey claiming in a telephone interview that all funds collected by the members are used solely for the Temple's services, and that he himself draws an income of less that $5,000 a year. In sum, Newfield cautioned passersby to "beware of Jerome Mackey's upside-down water coolers". The following day, Newfield wrote another article reporting about the issuance of the Attorney General subpoenas (see Second Amended Complaint, Exhibit "X").

Without complying with the subpoenas, on November 22, 1988, the plaintiffs commenced this federal court action by order to show cause against the defendants based on alleged violations of the Temple's and Mackey's constitutional rights under 42 U.S.C. § 1983, as well as conspiracy to violate their constitutional rights under 42 U.S.C. § 1985(3). In particular, the plaintiffs alleged that the defendants conspired to deprive them of their First and Fourteenth Amendment rights and violated their rights of privacy and association, free exercise of religion, equal protection of the law and the establishment clause of the First Amendment.

According to the plaintiffs, there was an overall conspiracy to financially cripple the Temple. The plaintiffs alleged that the defendants agreed among themselves that the Daily News would publish a series of damaging articles on the Temple and Mackey, and that the Attorney General would undertake an investigation of their activities. The plaintiffs alleged that these constitutional violations began not with this most recent investigation, but rather as early as the 1960's ever since Mackey was on the Attorney General's "hit list". Mackey alleged that the Attorney General's systematic harassment of him began with the investigation into the operation of his self-defense schools (*see,, e.g., United States v. Corr*, 543 F.2d 1942 [2d Cir. 1976] [employee of Jerome Mackey's Judo Inc. convicted of various counts of securities fraud, mail fraud and perjury with regard to financing of the business]), his stereo tape distributing business (*see, e.g., United States v. Mackey*, 405 F. Supp. 854 (E.D.N.Y. 1975]

[mail fraud], and now continues with the investigation into the Temple's activities. Because of these alleged constitutional deprivations, the plaintffs sought injunctive relief from further harassment and compensatory and punative damages.

On December 6, 1988, Judge Raggi denied the plaintiffs' application to preliminarily enjoin the Attorney General from continuing its investigation and to require the Daily News to give "equal space" to the plaintiffs in their publication.

Meanwhile, the Temple and Mackey continued to fail to comply with the administrative subpoenas issued earlier. On December 6, 1988 the Attorney General made a motion before Justice Edward Greenfield in Supreme Court, New York County, for an order to compel compliance. The Temple and Mackey cross-moved to quash the subpoenas, as well as to dismiss the proceeding brought by the Attorney General.

In the interim, while the motions in state court were *sub judice*, the Daily News and Attorney General moved in this Court before Judge Raggi, requesting dismissal or in the alternative an abstention from further proceedings until such time as the state court rules on the validity of the subpoenas. On June 7, 1989, Judge Raggi granted the defendants' motion by abstaining from exercising federal jurisdiction over the plaintiff' action until such time as the state court proceeding came to a conclusion. Judge Raggi specifically chose to stay, rather than dismiss the action, reasoning as follows:

> "Because there is some question as to whether plaintiffs can obtain full legal as well as equitable relief if they are successful in the pending state proceedings, the court stays, rather than dismisses, this action against the Attorney General and his assistant until this is clarified."

Temple of the Lost Sheep, Inc. v. Abrams, No. CV-88-3675, slip op. at p. 20 (E.D.N.Y. June 7, 1989).

Judge Raggi "abstain[ed] from hearing plaintiffs' federal claims until the conspiracy issue is resolved in state court as to the Attorney General" (slip op. at p. 22), and declined to rule on all other claims "until the state proceeding concludes, since the decision in that case may very well modify, *if not dispose of*, certain of the claims raised here" (slip op. at p. 22) (emphasis supplied).

Thereafter, on January 4, 1990, Justice Greenfield rendered a decision on the motions in the state court proceeding, which granted the Attorney General's motions to compel compliance with the subpoenas and denied the Temple's cross-motions to quash and dismiss. With respect to Judge Raggi's abstention decision, Justice Greenfield stated:

> "With respect to that part of the cross-motion for an order to stay and enjoin the Attorney General from continuing with the investigation upon the ground that there is another and prior action pending between the same parties in the Federal District Court, *this court finds that the District Court has deferred to this court to determine the various issues raised by Mackey and the Temple*. Therefore, it is not necessary for this court to discuss and determine the overlapping of the two actions and whether the resolution of the Federal action will be dispositive of this proceeding to compel compliance with the subpoena."

Matter of Abrams v. the Temple of the Lost Sheep, Inc., No. 88-47250, N.Y.L.J., Jan. 16, 1990, at p. 27, col.4 (Sup. Ct. N.Y. County Jan. 4. 1990) (emphasis supplied).

The Temple initially appealed Justice Greenfield's decision to the Appellate Division, First Department, but later withdrew the appeal and complied with the subpoenas by producing documents.

On March 30, 1990, the Temple moved to set aside the abstention on the ground that Justice Greenfield's decision "finally determined" the state action, and that therefore this matter should proceed with discovery and trial. At oral argument, this Court directed the parties to address the issue of when the state administrative matter is deemed to be "concluded" within the meaning of Judge Raggi's order. On April 13, 1990, this Court vacated the stay previously directed by Judge Raggi since the State court action is now considered to be concluded.

The defendants now make the instant motions to dismiss on the grounds of collateral estoppel, failure to state a claim, and in the case of the Attorney General, qualified immunity. In the alternative, the defendants move for a continuation of abstention by this Court. In the interim, pending a determination by the Court on these motion, the defendants also seek a stay of all discovery.

DISCUSSION

1. Motion for a Stay of Discovery.

The defendants requested a stay of all discovery pending a determination on these motions, which application was granted by the Court at oral argument on May 18. 1990.

Although not expressly authorized by stature or rule (*cf.* N.Y. Civ. Prac. L.& R. 3214[b] [discovery stayed pending motion to dismiss]), the federal district courts do have discretion to authorize a stay of discovery pending the determination of dispositive motions (*see, e.g., Transunion Corp. v. Pepsico, Inc.*, 811 F.2d. 127, 130 [2d Cir. 1987] [protective order preventing discovery pending determination on motion to dismiss for *forum non conveniens* is permissible]). Discovery should only be stayed, however, where, as here, there are no factual issues in need of further immediate exploration, and the issues before the court are purely questions of law (*see, e.g., F.H. Krear & Co. v. 19 Named Trustees,*

91 F.R.D. 497, 498 [S.D.N.Y. 1981]; *see also Jarvis v. Regan*, 833 F.2d. 149, 155 [9th Cir. 1987]; *Florsheim Shoe Co. v. United States*, 744 F2d 787, 797 [Fed. Cir. 1984]).

2. Motions to dismiss.

Since both the Daily News and the Attorney General move for similar relief, namely, to dismiss, or, in the alternative, for an abstention, a discussion of the law and facts applicable to both parties' motions is treated together, except where the parties' arguments or facts may differ.

(a). Collateral Estoppel :

Both the Daily News as well as the Attorney General allege that the decision of Justice Greenfield has preclusive collateral estoppel effect in this case. Specifically, the defendants maintain that Justice Greenfield addressed the constitutional claims in upholding the validity of the subpoenas issued, and that he made findings that there was no "bad faith" on the part of the Attorney General, thus entitling him to the cloak of qualified immunity. The defendants also contend that Justice Greenfield made a finding that there was no conspiracy or collusion between the defendants. Finally, the defendants urge that, in addition to Justice Greenfield's decision, Judge Raggi made certain findings in her abstention decision on the issue of bad faith, which is now the law of the case.

In opposition, aside from primarily arguing the merits of their case, (Footnote 2), the plaintiffs allege that

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Footnote 2: Rather than focusing on the collateral estoppel effect, if any, of Justice Greenfield's decision, the plaintiffs devote much of their memorandum of law to this contention that the Attorney General lacks authority to conduct such an investigation into the affairs of a charitable non-profit organization. This, however, is precisely the issue that Justice Greenfield decided in a second related proceeding involving Mackey (*see Abrams v. New York Foundation for the Homeless*, N.Y.L.J., Jan. 16, 1990, at p. 27, col. 6 [Sup. Ct. N.Y. County Jan. 4, 1990]).

collateral estoppel or res judicata does not bar claims that could not have been and were not actually litigated in state court.

Pursuant to 28 U.S.C. § 1738, a federal court is required to apply the rules of collateral estoppel of the state in which a prior judgment was rendered, where the same issues are later raised in federal court (*see Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 [1984] [citing cases]. Accordingly, the Court turns to the New York law on the issue of collateral estoppel.

It is well settled that "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first cause" (*Allen v. McCurry*, 449 U.S. 90, 94 [1980]). "Application of the doctrine of collateral estoppel requires a finding of the [identicality of an issue necessarily decided in the prior action' and [a full and fair opportunity to contest the issue in the prior action'" (*Benjamin v. Coughlin*, 905 F.2d 571, 575 [2d cir. 1990]. *quoting Halyalkar v. Board of Regents*, 72 N.Y. 2d 261, 266, 527 N.E. 2d 1222, 1224, 532 N.Y.S. 2d 85, 87 [1988]). A district court is precluded from relitigating not only claims that were actually litigated and determined in a prior proceeding, but also those claims that "*could have been litigated* in the prior state court proceedings" (*Collard v. Incorporated Village of Flower Hill*, 604 F. Supp. 1318, 1323, [E.D.N.Y. 1984] [emphasis supplied], aff'd, 759 F.2d 205 [2d Cir.], *cert. denied*, 474 U.S. 827 [1985]).

Under New York law, in order for collateral estoppel to bar relitigation of an issue in a subsequent action or proceeding, two elements must first be met:

> (1) the issue to be decided in the second action is identical to an issue necessarily decided in a prior proceeding' and

> (2) the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding.

Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455, 482 N.E.2d 63, 67, 492 N.Y.S. 2d 584, 588, [1985].

The requirement of identity of issues is an absolute one, requiring a careful examination of the facts in the context of both the state and federal action (*see Wilder v. Thomas*, 854 F.2d 605, 617 [2d Cir. 1988], cert denied sub nom. *Wilder v. New York State Urban Dev. Corp.*, 109 S.Ct. 1314 [1989]).

In order to determine the collateral estoppel effect, if any, of Justice Greenfield's order, it is necessary to review his decision in light of Judge Raggi's abstention decision.

In Judge Raggi's abstention decision dated June 7. 1989, the specific arguments that the Temple and Mackey raised in their motion before Justice Greenfield in opposing the subpoenas were summarized as follows:

> "Among arguments raised in support were: (a) that the subpoenas were beyond the jurisdictional authority of the Attorney General as granted by New York law; (2) that because a church is involved, subpoenas can only issue on the showing of a compelling state interest; (3) that the first and fourth amendments to the constitution preclude holding a church in contempt for failing to disclose its financial records; (4) *that the Attorney General was engaged in a conspiracy to deprive Mackey and the Temple of constitutional rights*; (5) that compliance with the subpoenas would infringe rights of privacy, association and religious belief."

Temple of the Lost Sheep Inc. v. Abrams, No CV-88-3675, slip op. at p. 13 (E.D.N.Y. June 7, 1989) (emphasis supplied).

After reviewing the factors to determine the appropriateness of an abstention, Judge Raggi held:

> "There being no evidence of bad faith sufficient to excuse abstention and *this court being convinced that plaintiffs can adequately raise their constitutional challenges to the Attorney General's conduct in pending state proceedings*, this court abstains from now addressing those claims. Because there is some question as to whether plaintiffs can obtain full legal as well as equitable relief *if they are successful* in the pending state proceedings, the court stays, rather than dismisses, this action against the Attorney General and his assistant until this is clarified." Slip op. at p. 20 (emphasis supplied).

Judge Raggi also noted that the Temple does not dispute that it was able to raise the constitutional issues before the state court in seeking to have the subpoenas quashed:

> "Plaintiffs do not dispute that they can raise their constitutional challenges to the Attorney General's investigation in the pending state proceeding. Indeed, in moving to have the state court quash the outstanding subpoenas, plaintiffs argued that compliance would infringe constitutional rights of privacy, association and religious belief. They have, moreover, advised the state court that they believe themselves to be the victims of a conspiracy aimed at abridging these constitutional rights. The

> state court is clearly competent to address these constitutional challenges to the subpoenas, for it has long been recognized that [[u]pon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States . . . whenever those rights are involved in any suit or proceeding before them'". Slip op. at p. 17, *quoting Robb v. Connolly*, 111 U.S. 624, 637 (1884).

Specifically as to the possible collateral estoppel effect that Justice Greenfield's decision *might* have on this litigation, Judge Raggi anticipated the following:

> "How the state court rules with respect to the question of whether the Attorney General was involved in any conspiracy with the other named defendants — and if he was, whether their mutual objectives were unconstitutional — could, after all, have collateral estoppel effect in proceedings in this court, *at least as against plaintiffs*.
>
> * * *
>
> The court will not address defendants' remaining challenges to plaintiffs' claims until the state proceeding concludes, since the decision in that case may very well modify, *if not dispose of*, certain of the claims raised here." Slip op. at pp. 21-22(emphasis supplied).

In addition to abstaining, Judge Raggi made an express finding that the plaintiffs failed to support their allegations that the Attorney General acted improperly in carrying out the investigation, by stating that, "this court finds no basis for concluding that the Attorney General is pursuing his investigation of Mackey's latest venture without any expectation of achieving a legitimate law enforcement goal" (*see* slip op. at p. 19).

In upholding the validity of the subpoenas, Justice Greenfield noted that he was aware of the pending federal court action and was familiar with all of the papers filed. He "stressed that the investigation does not prevent Mackey or the Temple from practicing their religious activity, nor is it disruptive to such activity" (*Abrams v. Temple of the Lost Sheep, Inc.*, No. 88-47250, N.Y.L.J., Jan.16, 1990, at p. 27, col. 4 [Sup. Ct. N.Y. County Jan. 4, 1990]). Justice Greenfield proceeded to make the following findings:

> "After reviewing the complaints of Mackey and the Temple in the District Court action and the papers submitted by them in this proceeding, this court finds no basis for concluding that the Attorney General is acting in bad faith in pursuit of his investigation of either Mackey or the Temple.
>
> The blanket objection by Mackey and the Temple that compliance with the subpoena would deprive them of their Fifth Amendment right to be free from self-incrimination has no merit. Neither the Temple nor its officers have any Fifth Amendment rights against the production of corporate records pursuant to lawful judicial order (*Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186). Moreover, with respect to respondents' Fourth Amendment rights involving both State and

> Federal searches and seizure, all that is required is that the subpoenaed materials be relevant to the investigation being conducted and that the subpoena not be overbroad or unreasonably burdensome. *Far Rockaway Nursing Home v. Hynes*, 44 NY 2d 383."

Significantly, Justice Greenfield held that "this court finds that the District Court has deferred to this court to determine the various issues raised by Mackey and the Temple. Therefore, it is not necessary for this court to discuss and determine the overlapping of the two actions and whether the resolution of the Federal action will be dispositive of this proceeding to compel compliance with the subpoena".

It is well settled that in attempting to quash a subpoena duces tecum in state court, the burden is on the petitioners "to make at least *some* showing that production of the information sought would impair their 1st Amendment rights" (*Matter of Full Gospel Tabernacle, Inc. v. Attorney General of the State of New York*, 142 A.D.2d 489, 493, 536, N.Y.S. 2d 201, 203 [3d Dep't 1988] [emphasis supplied]; *see also Matter of Grand Jury subpoenas for Locals 17, 135, 257 & 608 of United Brotherhood of Carpenters & Joiners*, 72 N.Y. 2d. 307, 528 N.E. 2d. 1195, 532 N.Y.S. 2d. 722. *cert. denied sub nom. Local 17 of United Brotherhoood of Carpenters & Joiners v. New York*, 488 U.S. 966 [1988]). Once that showing is made, the burden shifts to the Attorney General to show "that the infringement is outweighed by a compelling state interest, to which the information sought is substantially related, and that the State's ends may not be achieved by less restrictive means" (*see Full Gospel, supra [citations omitted]*}. Accordingly, on the motions by the Temple and Mackey to quash, they were required to make at least *some* showing that the production would infringe on their First Amendment rights

Significantly, Judge Raggi *stayed* rather than *dismissed* the action because she found that "there is some

question as to whether plaintiffs can obtain full legal as well as equitable relief *if they are successful* in the pending state proceedings." (slip op. at p. 20 [emphasis supplied]). If the plaintiffs had made some showing that their constitutional rights had been infringed or had they been successful before Justice Greenfield, the only relief available to them in state court was to quash the subpoenas; there were no claims for monetary or injunctive relief pending before him. Accordingly, had the Temple and Mackey been successful in state court, they could then have proceeded to pursue their claims for equitable and monetary relief in this Court.

However, the Temple was not successful in the state proceeding. In fact, the burden to show a compelling state interest never even shifted to the Attorney General, since Justice Greenfield found that the plaintiffs failed to sustain their burden of making *some* showing of a constitutional violation. In this regard, Judge Raggi correctly predicted that the outcome of the state court proceedings "could, after all, have collateral estoppel effect in proceedings in this court, *at least as against plaintiffs*" (slip op. at p. 21 [emphasis supplied]).

Therefore, Justice Greenfield's decision does collaterally estoppel the plaintiffs from relitigating their constitutional claims, namely, those based upon the First and Fourteenth Amendments. In opposing the subpoenas in state court, the Temple argued that the Attorney General had to make a showing of compelling state interest; that compliance with the subpoenas violated their rights of privacy, association and religious belief; that production would infringe on their Fourth and Fifth Amendment rights; and that the Attorney General was engaged in a conspiracy to deny Mackey and the Temple their constitutional rights. In sum, the plaintiffs' constitutional claims were specifically rejected by the state court in finding that the Temple and Mackey had not met their burden in opposing the subpoenas by showing any constitutional violations by the defendants. It is clear therefore, that the Temple had a full and fair opportunity to raise the precise constitutional claims that are now brought before this Court.

Had Justice Greenfield found that the plaintiffs made some showing of a violation, then the doctrine of collateral estoppel would not have been applicable as against the plaintiffs.

On the contrary, Justice Greenfield found "no basis for concluding that the Attorney-General is acting in bad faith in pursuit of his investigation of either Mackey or the Temple". Judge Raggi has already determine that :

> "Plaintiffs do not dispute that they can raise their constitutional challenges to the Attorney General's investigation in the pending state proceeding. Indeed, in moving to have the state court quash the outstanding subpoenas, plaintiffs argued that compliance would infringe constitutional rights of privacy, association and religious belief. They have, moreover, advised the state court of a conspiracy aimed at abridging these constitutional rights.
>
> * * *
>
> [T]here has been no court finding to date of any improper conduct by the Attorney General or his staff in its investigations of Mackey-related enterprises. Neither does the record reflect continued threats of prosecution despite a history of unsuccessful attempts.
>
> * * *
>
> [There is] no basis for concluding that the Attorney General is pursuing his investigation of Mackey's latest venture without any expectation of achieving a legitimate law enforcement goal.

> To the extent that plaintiffs urge a finding of bad faith from alleged collusion between the Attorney General and the *Daily News*, the court finds conclusory allegations in this regard insufficient to support such an inference. No facts have been alleged indicating that the *Daily News* reports on the Temple were published at the behest of the Attorney General, rather than on the independent editorial judgment of the newspaper. The mere fact that the *Daily News* arranged for former Temple members to meet with officials at the Attorney General's office and recount possible financial improprieties on the part of plaintiffs does not demonstrate bad faith." Slip op. at pp 17-20.

Accordingly, because the First and Fourteenth Amendment claims which are the basis for this lawsuit against the Attorney General and Daily News in the federal court, are exactly the same as those which were presented before Judge Raggi in her prior decision and Justice Greenfield in passing upon the propriety of the subpoenas, the doctrine of collateral estoppel now bars relitigation of those issues, since this Court finds that the Temple and Mackey were afforded a full and fair opportunity to make at least some showing of these constitutional violations in state court. Therefore, the plaintiffs' claims under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendments, are dismissed.

(b) Failure to State a Claim:

1. Claims Under 42 U.S.C. § 1985(3).

In addition to finding that the decisions of Judge Raggi and Justice Greenfield have collateral estoppel effect here as to the First and Fourteenth Amendment claims under 42 U.S.C. § 1983, the defendants urge, and the Court finds,

that the Temple's Second Amended Complaint fails to state a claim under Fed. R. Civ. P. 12(b)(6) for violation of 42 U.S.C. § 1985(3). Although the factual allegations in the complaint are sharply disputed by the parties, the court accepts all of the plaintiffs' allegations as true in regard to the motions to dismiss for failure to state a claim (see *Neustein v. Orbach*, 732 F. Supp. 333, 343 [E.D.N.Y. 1990] [citing cases]).

In order to state a claim for conspiracy under 42 U.S.C. § 1985(3), a plaintiff must allege that the defendants (1) engaged in a conspiracy, (2) for the purpose of either directly or indirectly depriving him or a class of persons of which he is a member equal protection of the laws; and that (3) acts taken by the defendant in furtherance of the conspiracy (4) deprived him or the class the exercise or privilege of a citizen of the United States (*see New York State NOW v. Terry*, 886 F. 2d 1339, 1358 [2d Cir. 1989], cert. denied, 110 S. Ct. 2206 [1990]; see also *Griffin v. Breckenridge*, 403 U.S. 88, 102-03, [1971]; *Sorlucco v. New York City Police Dep't*, 888 F. 2d 4, 8 [2d Cir. 1989]). Under section 1985, a plaintiff must also demonstrate "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action'" (*New York State NOW v. Terry*, 886, F. 2d at p. 1358, quoting *Griffin v. Breckenridge*, 403 U.S. at pp. 102-03.[3] Although the precise reach of section 1985(3) remains somewhat unresolved (*see, e.g., United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 835-37 [1983] [leaving open the question of whether statute is aimed against any other class based animus other than directed at blacks]), it has been held to encompass women as a class (*see, e.g., New York State NOW v. Terry, supra*, 886 F. 2d. at p. 1359), classes based on political association (*see e.g., Keating v. Carey*, 706 F. 2d 377, 386 [2d Cir. 1983]), and those based on religion (*see, e.g., Volk v. Coler*, 845 F. 2d 1422, 1434 [7th Cir. 1988]). However, it is well settled that class-based *economic* animus is beyond the reach of a claim under section 1985 (*see Scott, supra*, 463 U.S. at p. 838-39;

Footnote 3: The term "animus" has been defined by the Second Circuit as "merely describ`ing] a person's basic attitude or intention" (*New York State NOW v. Terry, supra*, 886 F.2d. at p. 1359).

see also Chow v. Coughlan, CV-88-1563, slip op. at pp. 8-11 [E.D.N.Y. June 28, 1990] [low-income tenant organizers are not a protected class under 42 U.S.C. § 1985]).

The plaintiffs' conspiracy claims under section 1985 fail to state a claim for two reasons. First, even as to this Second Amended Complaint, the Court agrees with Judge Raggi's prior determination that the plaintiffs' allegations of bad faith from alleged collusion between the Attorney General and Daily News are "conclusory allegations . . . insufficient to support such an inference". According to Judge Raggi, "[t]he mere fact that the *Daily News* arranged for former Temple members to meet with officials at the Attorney General's office and recount possible financial improprieties on the part of plaintiffs does not demonstrate bad faith" (slip op. at pp. 19-20). This Court agrees and declines to disturb that finding, not because of the doctrine of "law of the case" as the defendants urge, but rather because this Court finds that the Second Amended Complaint adds, in effect, nothing more than what was before Judge Raggi. Additionally, the Court notes that similarly, Justice Greenfield also found that the Attorney General properly exercised his authority to investigate the Temple's affairs and that the Attorney General did not act in "bad faith" in carrying out the investigation.

Second, the plaintiffs have failed to allege with any degree of specificity or particularity the acts alleged to have been taken by the defendants in furtherance of the conspiracy which may have deprived the plaintiffs of any privileges or rights under the constitution. The plaintiffs mere conclusory allegations of a conspiracy, without more, simply do not state a claim for violation of constitutional rights. A constitutional conspiracy claim must be pled with some degree of particularity (*see Bertucci v. Brown*, 663 F. Supp. 447, 454 [E.D.N.Y. 1987]; *see also Neustein v. Orbach, supra*, 732 F. Supp. at p. 346 ["allegations that Orbach engaged in a conspiracy . . . are no more than naked improbable unsubstantiated assertions without any specifics"]).

Accordingly, pursuant to Fed. R. Civ. P. 12(b)(6), the plaintiffs' claims under 42 U.S.C. § 1985(3), are dismissed for failure to state a claim.[4]

2. Injury to Reputation.

In addition to alleging the constitutional deprivations set forth above, the plaintiffs allege that their reputation has been diminished by the Daily News articles and Attorney General's investigation. In opposition, the Daily News alleges that the publication of articles about the Temple which resulted in an investigation by the Attorney General, do not rise to the level of constitutional violations actionable under section 1983. The Daily News further alleges that even if the reputation of the Temple or Mackey has been damaged as a result of the publication of the articles, the law of defamation provides ample redress. Furthermore, the Daily News contends that the element of "state action" on its part is absent, especially in light of the findings of Judge Raggi and Justice Greenfield that no bad faith collusion existed between the Daily News and the Attorney General. This Court agrees.

It is well settled that injury or damage to reputation in and of itself is insufficient to invoke due process protection (*see Paul v. Davis*, 424 U.S. 693, 701 [1976]). To the extent that the plaintiffs may possess a cause of action for defamation, absent a federal question or diversity, that kind of action, standing alone does not belong in the federal court, and the Court declines to exercise pendent jurisdiction over such a claim. Also, the plaintiffs failed to sufficiently allege the required "state action" on the part of the Daily News defendants to support a claim under 42 U.S.C. § 1983. Accordingly, insofar as the plaintiffs allege a cause of action based on injury to reputation, that claim is dismissed.

Footnote 4: Although the Daily News urges dismissal for lack of subject matter jurisdiction rather than failure to state a claim, the Court notes that the complaint plainly seeks relief under the federal Constitution and therefore the latter motion is the proper one (*see Spencer*

3. Qualified Immunity.

Notwithstanding the foregoing multi-facited dismissal of the plaintiffs' claims, the Court also finds that the Attorney General is entitled to the cloak of "qualified immunity" from any action to recover damages under section 1983.

It is well settled that while prosecutors have absolute immunity from section 1983 liability for actions taken during the course of a judicial proceeding (*see Imbler v. Pachtman*, 424 U.S. 409, 417-19 [1976]; *see also Schloss v. Bouse*, 876 F. 2d 287 [2d Cir. 1989] [absolute immunity for "quasi-judicial" acts as well]), qualified immunity attaches when they are acting in their "administrative" or "investigative" capacities, as in this situation (*see Barr v. Abrams*, 810 F. 2d 358, 361 [2d Cir. 1987]). "The test is whether the prosecutor is engaged in activities that are [intimately associated with the judicial phase of the criminal process'" (*Day v. Morgenthau*, 909 F. 2d 75, 78 [2d Cir. 1990], *quoting Imbler v. Pachtman, supra*, 424 U.S. at p. 430 [other citations omitted]).

In order to be entitled to qualified immunity, the prosecutor must demonstrate that he or she acted in "good faith" (*see Powers v. Coe*, 728 F. 2d 97, 103 [2d Cir. 1984]), which requires " a showing that his [or her] acts were objectively reasonable" (*Day v. Morgenthau, supra*, 909 F. 2d at p. 78). As stated above, both Judge Raggi and Justice Greenfield found that the Attorney General and his staff acted properly in carrying out the investigation, and that he had not acted in bad faith. The Court is cognizant that Judge Raggi's finding was made at a threshold pleading state on a motion to dismiss. However, this Court finds that with regard to this issue, the plaintiffs have not pled any additional facts which would lead this Court to depart from Judge Raggi's conclusion. Accordingly, with respect to the Attorney General defendants, the court finds that the Attorney General and his staff acted in good faith and are entitled to immunity from a section 1983 damages action for their activities undertaken in connection with the investigation of the affairs of the Temple and Mackey.

c. Motion for Continued Abstention.

Both the Daily News and the Attorney General argue that if the Court does not dismiss the action, then a continuation of the prior abstention order is appropriate at this time, since, according to the Attorney General, the investigation is ongoing.

Because the Court is dismissing this action in its entirety, the defendants' motion for renewal of abstention is now rendered moot.

d. Motion for Sanctions.

The Daily News seeks Rule 11 sanctions against the plaintiffs for filing this action and continuing to litigate these issues.

Rule 11 was enacted to "discourag[e] dilatory and abusive litigation tactics and eliminat[e] frivolous claims and defenses, thereby speeding up and reducing the costs of the litigation process" (*McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 21 [2d Cir. 1990]; *see also* Fed. R. Civ. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 [1983] ["should. . . help to streamline the litigation process by lessening frivolous claims or defenses"]). Sanctions should be sparingly imposed, however, and care should be taken to avoid chilling creativity or stifling enthusiasm (*see Securities Indus. Ass's v. Clarke*, 898 F.2d 318, 322 [2d Cir. 1990]). However, once a violation of the Rule is found, the district court *must* impose sanctions (*see O'Malley v. New York City Transit Auth.*, 896 F. 2d 704, 709 [2d Cir. 1990]).

Applying the "objectively reasonable" test to the plaintiffs' papers as this Court must (*see Eastway Constr. Corp. v. City of New York*, 762 F. 2d 243, 253 [2d Cir. 1985]), the Court finds that neither the plaintiffs nor counsel for the plaintiff Temple violated Rule 11, and therefore declines to

impose sanction. Accordingly, the Daily News' motion for sanctions is denied.

CONCLUSION

Based upon the foregoing, the defendants' motions to dismiss are granted as follows : the plaintiffs' claims arising under 42 U.S.C. § 1983 for violations of their First and Fourteenth amendment rights are dismissed as barred by the doctrine of collateral estoppel based on the decisions of Judge Raggi and Justice Greenfield, and additionally, as to the Attorney General defendants, based upon qualified immunity. The plaintiffs' claims under 42 U.S.C. § 1985(3) are also dismissed under Fed. R. Civ. P. 12(b)(6), for failure to state a claim. The plaintiffs' remaining state-law claims are dismissed for lack of subject matter jurisdiction. Accordingly, the Second Amended Complaint is dismissed in its entirety.

The defendants' motion for renewed abstention is denied as moot, and the Daily News' motion for sanctions is denied.

SO ORDERED.

Dated : Brooklyn, New York
September 25, 1990

ARTHUR D. SPATT
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1103—August Term 1990

Argued: February 20, 1991 Decided: April 5, 1991

Docket No. 90-7981

TEMPLE OF THE LOST SHEEP INC., a/k/a ACTION COMMITTEE TO HELP THE HOMELESS NOW, and HENRY JEROME MACKEY,

Plaintiffs-Appellants,

- against -

ROBERT ABRAMS, Attorney General of the State of New York, NEW YORK NEWS, INC., JACK NEWFIELD JOHN DAVIS, THOMAS WHELAN and JILL LAURIE GOODMAN,

Defendants-Appellees.

Before:

FEINBERG, TIMBERS and MINER,
Circuit Judges.

Appeal from judgment of the United States District Court for the Eastern District of New York, Arthur D. Spatt, J., dismissing the complaint on the grounds that plaintiffs were collaterally estopped from pursuing their claims arising under 42 U.S.C. § 1983 because a prior related state court proceeding resolved against plaintiffs issues central to those claims; plaintiffs' claim arising under 42 U.S.C. § 1985(3) failed to state a claim and there was a lack of subject matter jurisdiction for plaintiffs' remaining state-law claims.

Affirmed.

JAMES ROBERSON JR., New York, NY, for Plaintiff-Appellant.

KEVIN W. GOERING, New York, NY (Coudert Brothers, P. Rivka Schochet, of counsel), for Defendants-Appellees New York News, Inc. and Jack Newfield.

WILLIAM K.SANDERS, New York, NY, Assistant Attorney General for the State of New York (Robert Abrams, Attorney General of the State of New York, of Counsel), for Defendants-Appellees Robert Abrams and Jill Laurie Goodman.

FEINBERG, *Circuit Judge*:

This fiercely contested litigation, which has been conducted in both federal and state courts since the fall of 1988, involves the interaction of the doctrines of abstention and collateral estoppel. Plaintiffs Temple of the Lost Sheep

Inc., a/k/a Action Committee to Help the Homeless Now (the Temple), and Henry Jerome Mackey appeal from a judgment of the United States District Court for the Eastern District of New York, Arthur C. Spatt, J., dismissing their complaint against Robert Abrams, Attorney General of the State of New York, Assistant Attorney General Jill Laurie Goodman (the State defendants) New York News, Inc., Jack Newfield (the Daily News defendants), John Davis and Thomas Whelan. The district court dismissed appellants' claims arising under 42 U.S.C. § 1983 because a state court proceeding had resolved against appellants issues central to those claims, and alternatively, as against the State defendants, those claims were barred by qualified immunity. The district court also found that appellants' claims arising under 42 U.S.C. § 1985(3) failed to state a claim under Fed. R. Civ. P. 12(b)(6), The court then dismissed the remaining state-law-claims for lack of subject matter jurisdiction. For the reasons given below, we affirm.

Background

According to the complaint, the Temple operated as an unincorporated religious society from approximately 1960 to 1980 and was thereafter incorporated pursuant to New York's Religious Corporation Law. Appellant Mackey is a founder of the Temple and its "titular head." One of the Temple's stated objectives is "to provide a haven wherein persons who believe themselves to be [Lost Souls' may find a temporary refuge, during which time they may seek their own Spiritual regeneration." Towards that end, the Temple maintains a shelter for homeless men in Queens, New York. Those residing at the shelter must comply with the Temple's goals and rules. In particular, members are required to "solicit alms from the donating public" by begging, and they then turn over most of those proceeds to Mackey and the Temple.

Defendants John Davis and Thomas Whelan are homeless persons who were admitted to the Temple shelter in 1988. They later defected from the organization and con-

tacted defendant Jack Newfield, at that time a staff writer and regular columnist for the Daily News newspaper published by defendant New York News, Inc. After Davis and Whelan told Newfield that as a condition for staying in the shelter, the Temple required its members to beg and then turn over the proceeds to Mackey, Newfield arranged to have Davis and Whelan tell their story to defendant Attorney General for possible investigation.

The Attorney General began an administrative investigation to determine whether the Temple was engaging in fraud under the guise of charitable activity in violation of various provisions of New York statutory law, and accordingly issued subpoenas in the fall of 1988, through defendant Assistant Attorney General Jill Laurie Goodman, to be served on several "John Doe" Temple members and Mackey. In the interim, Newfield wrote two stories in the Daily News, which recounted Mackey's criminal past, reported his personal wealth, described the Temple's operations and the experiences of Davis and Whelan, cautioned passersby to "beware of Jerome Mackey's upside-down water coolers" and reported the issuance of the Attorney General's subpoenas.

Without complying with the subpoenas, appellants commenced this suit in the Eastern District in November 1988, alleging various violations of their constitutional rights under 42 U.S.C. § 1983 and a conspiracy to violate their rights under section 1985(3). Appellants alleged that pursuant to an overall conspiracy to financially cripple the Temple, defendants agreed that a series of damaging articles on the Temple and Mackey would be published in the Daily News and that the Attorney General would undertake an investigation of their activities, including issuance of the subpoenas at issue. The complaint also alleged that Mackey had been on the Attorney General's "hit list since the 1960's as evidenced by various investigations to which Mackey or his businesses had been subjected. See *e.g.*, *United States v. Corr*, 543 F.2d 1042 (2d Cir. 1976) (employee of Jerome Mackey's Judo Inc. convicted of securities fraud and other crimes with regard to financing of the business): *United States v. Mackey*, 405 F. Supp. 854

9E.D.N.Y 1975)(Mackey convicted of mail fraud relating to his operation of Mackey Distributors, Inc.). Appellants sought injunctive relief from further harassment and compensatory and punative damages for the alleged constitutional deprivations.

Appellants also moved for a preliminary injunction prohibiting the Attorney General from continuing his investigation and requiring the Daily News to give "equal space" to appellants in that newspaper. In December 1988, Judge Reena Raggi denied the motion on the grounds, among others, that the court would probably abstain from hearing the case, and that plaintiffs had not established a likelihood of success on the merits.

At that time, the Temple and Mackey had still not complied with the subpoenas, and the Attorney General moved before Justice Edward Greenfield in Supreme Court, New York County, for an order to compel compliance. The Temple and Mackey cross-moved to dismiss the proceedings and to quash the subpoenas in part on the ground that the Attorney General issued the subpoenas pursuant to a conspiracy to deprive the Temple and Mackey of their constitutional rights. While these motions were pending in state court, the State and Daily News defendants moved in the district court before Judge Raggi for dismissal of appellants' complaint or in the alternative for abstention from further proceedings until the state court ruled on the validity of the subpoenas. In June 1989, Judge Raggi granted the motion, and stayed this action pending the conclusion of the related state court proceeding.

Appellants thereafter moved for Judge Raggi's recusal on the ground that she was biased. The judge denied the motion in June 1989. The Temple and Mackey appealed from this order and also sought a writ of mandamus in this court compelling the judge to recuse herself. This court dismissed the appeal, and also denied the petition for mandamus.

In addition, according to appellants, they moved in the state court to prevent Justice Greenfield, in deciding the motions pending before him, from making any determination regarding appellants' federal claim of conspiracy. In January 1990, however, Justice Greenfield ruled on the motions before him, granting the Attorney General's motion to compel compliance with the subpoenas and denying appellants' cross-motions to quash and dismiss, thereby rejecting appellants' conspiracy claim. Appellants initially appealed Justice Greenfield's decision the the Appellate Division, First Department, but later withdrew their state appeal and apparently complied with the subpoenas.

Appellants also returned to the Eastern District and moved to vacate Judge Raggi's order staying the federal proceedings. The case was reassigned to Judge Spatt, and in June 1990 he found that the state court action had been concluded, and allowed the federal action to proceed. Subsequently, defendants moved to dismiss the federal complaint, and Judge Spatt granted that motion in September 1990 in part on the ground that appellants' section 1983 claims were barred by the doctrine of collateral estoppel. This appeal followed.

Discussion

A. *Abstention and Reservation of Federal Claims*

Appellants contend that the district court erred in applying collateral estoppel to their section 1983 claims, because they intentionally avoided raising those claims in the state court so as to reserve them for determination in the district court under the doctrine of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). The plaintiffs in *England* had commenced an action in federal court, alleging that a state statute violated their federal constitutional rights. Id. at 412-13. Plaintiffs also claimed that the state law did not apply to them. The district court then

abstained and remitted plaintiffs to the state courts on the ground that a state court decision interpreting the statute could moot the constitutional claims. Id. at 413. Plaintiffs voluntarily submitted both the state law and constitutional claims to the state court, which decided them adversely to plaintiffs. Id. at 413-14. The Supreme Court held that plaintiffs could have reserved their federal claims and thereby avoid preclusion, by informing the state court that they intended to return to federal court to pursue the federal claims should the state court rule against them on the question of state law. Id. at 421-22. According to appellants, under *England* a party is always able to reserve its federal claims whenever a district court abstains, and thus the district court here erred by precluding appellants from pursuing their "reserved" federal claims. We disagree.

It is clear that in *England*, the federal court abstained under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941)(*Pullman* abstention), which "involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477 (1977). By contrast, the district court in this case abstained under the authority of *Younger v. Harris*, 401 U.S. 37 (1971) (*Younger* abstention), which is warranted when there is an ongoing state proceeding involving an important state interest that provides the federal plaintiff with an adequate opportunity for judicial review of its federal constitutional claims. *Christ the King Regional High School v. Culvert*, 815 F.2d 219, 224 (2d Cir.), cert denied, 484 U.S. 830 (1987).

According to the Supreme Court, "[t]he holding in *England* depended entirely on this Court's view of the purpose of abstention" in a particular case. *Allen v. McCurry*, 449 U.S. 90, 101-02 n.17 (1980). It is thus necessary for us to determine whether the policies behind abstention in this case require appellants to be provided with the opportunity of reserving their federal claims, recognizing of course that this

was a *Younger* rather than a *Pullman* abstention. *Cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 & n.18 (1975).

The emphasis in *England* on a plaintiff's right to reserve its federal claims for determination in the federal court is a direct result of the purposes behind a *Pullman* abstention, because

> [W]here a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. Abstention may serve only to postpone, rather than to abdicate, jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary, or to obviate the risk of a federal court's erroneous construction of state law..

Allen, 449 U.S. at 101-02 n.17 (citations omitted)

Significantly, *Pullman* abstention does not necessarily involve an ongoing state proceeding. Instead, the abstention serves to allow a state proceeding to address the state law issues in deference to the state court's superior ability to determine unsettled questions of state law. *Pullman* abstention, as stated in *England*, essentially recognizes that by so deferring to the state courts, a federal court may not relieve itself of the jurisdictional duty it faced in the first instance. *Younger* abstention, however, gives rise to a different set of considerations, since it involves two pending proceedings and thus conflicting jurisdictional duties between the state and federal tribunals with the attendant possibilities that maintenance of the federal action will either result in duplicative legal proceedings or a disruption of the state proceedings. *Cf. Steffel v. Thompson*, 415 U.S. 452, 461-62 (1974). The situation is therefore not one of merely postpon-

ing federal jurisdiction as is the case in *Pullman* abstention, but instead "contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).

The rationale for allowing reservation of a federal claim in a state court proceeding following *Pullman* abstention in a federal court is thus not applicable to *Younger* abstention; this indicates that reservation is not available in the latter case. Indeed, this conclusion is compelled by the fact that *Younger* abstention derives from the recognition

> that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing [state proceeding] would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right granted or secured by the Constitution of the United States.

Steffel, 415 U.S. at 460-61 (citation omitted)

If, as appellants argue, a federal plaintiff could avoid the preclusive effects of the related state court proceeding by reserving its federal claims after the federal court abstains under *Younger*, then the federal court would fail to give effect to the ability of the state court to resolve federal constitutional questions, thereby undermining one of the central purposes behind *Younger* abstention. Moreover, such an approach would result in at least partially duplicative proceedings, one of the problems that *Younger* abstention attempts to remedy. Thus, the purposes behind *Younger* abstention suggest that a federal plaintiff may be collaterally es-

topped by a related state court proceeding, regardless of the plaintiff's desire to "reserve" the federal claim.

We accordingly hold that a federal plaintiff may not avoid preclusion by reserving in the state court its federal claims following *Younger* abstention. Judge Weinfeld reached this result in *Olitt v. Murphy*, 453 F. Supp. 354, 358 (S.D.N.Y.), aff'd without opinion, 591 F.2d 1331 (2d Cir. 1978), cert. denied, 444 U.S. 825 (1979), and although our summary affirmance there had no precedential value, we take this opportunity to explicitly adopt Judge Weinfeld's holding. The Ninth Circuit has also reached this result. See *Beltran v. California*, 871 F. 2d 777. 783 n.8 (9th Cir. 1988). Therefore, appellants' attempt, if any, to reserve their federal claims in the state court for later determination in federal court did not of itself prevent Judge Spatt from applying collateral estoppel based on Justice Greenfield's decision in the state court proceeding. The question still remains whether Judge Spatt was otherwise justified in applying that doctrine.

B. *The Collateral Estoppel Effects of the State Proceeding*

Pursuant to 28 U.S.C. § 1738, the federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 81, (1984). We have accordingly given a state court judgment preclusive effect in a subsequent action in federal court seeking relief under section 1983. *E.g., Collard v. Incorporated Village of Flower Hill*, 759 F. 2d 205, 207, (2d Cir.)(per curiam), cert. denied, 474 U.S. 827 (1985).

Under New York law, the "[a]pplication of the doctrine of collateral estoppel requires a finding of the identicality of an issue necessarily decided in the prior action and a full and fair opportunity to contest the issue in the prior action." *Benjamin v. Coughlin*, 905 F.2d 571, 575 (2d Cir. 1990). Appellants argue that neither of these requirements is

satisfied here. It is clear to us, however, that the district court properly found that appellants were collaterally estopped from pursuing their section 1983 claims, since the record shows that the state court directly decided issues that are central to appellants' 1983 claims and that appellants had a full and fair opportunity to litigate those issues.

The record shows that when Judge Raggi entered the June 1989 abstention order, she clearly contemplated that appellants' conspiracy allegations-which were central to their section 1983 claims-would be decided in the pending state proceeding before Justice Greenfield when he decided the cross-motion to quash the subpoenas. Under New York law, a subpoena will be quashed if compliance will unduly infringe upon fundamental rights such as those guaranteed by the First Amendment. See *Matter of Grand Jury Subpoenas*, 72 N.Y. 2d 307, 312, cert. denied, 488 U.S. 966 (1988). Judge Raggi thus properly found in the abstention order that appellants "can adequately raise their constitutional challenges to the Attorney General's conduct in pending state proceedings." Indeed, Judge Raggi summarized one of the arguments that the Temple and Mackey raised in their cross-motion in the pending state court proceeding as whether "the Attorney General was engaged in a conspiracy to deprive Mackey and the Temple of constitutional rights."

The abstention order also recognized the preclusive effects that would flow from the state court's determination. Significantly, Judge Raggi stayed the federal action rather than dismissing it, because if appellants had been *successful* in the state proceeding the only relief available to them there was to quash the subpoenas. Thus, by staying the federal action, Judge Raggi provided appellants with the opportunity for returning to federal court to receive monetary or injunctive relief for any constitutional violations found by the state court. *Cf. Davidson v. Capuano*, 792 F. 2d 275, 282 (2d Cir. 1986). Conversely, the judge also recognized in the order that if appellants were not successful in the state court, then those state court findings could have preclusive effect against appellants upon their return to federal court.

In light of the district court's abstention order, appellants were on notice that issues pertaining to their constitutional claims would be determined in the state court. Moreover, appellants took advantage of this opportunity. Although appellants now contend otherwise, one of the issues they chose to raise in the state court was their constitutional challenge to the subpoenas. In an affidavit submitted in the state court in support of the cross-motion to quash the subpoenas, the Temple's attorney alleged that the Attorney General met with Newfield, Davis and Whelan and issued the "meritless subpoenas." and that the Daily News defendants published the libelous articles as part of a conspiracy to deprive the Temple and Mackey of their civil rights. The attorney then state that "[i] would be impossible for this Court to compel compliance with those subpoenas if it is found that the Attorney General did in fact conspire to deprive plaintiffs of their Constitutional rights."

Appellants therefore chose to place the conspiracy allegations, which were central to their section 1983 claims, directly in issue in the state court proceeding. Justice Greenfield was aware that his decision might affect appellants' claims in the federal court, since he held that the district court "has deferred to this court to determine the various issues raised by Mackey and the Temple." In light of the foregoing, Judge Spatt properly found that the state court had adversely resolved issues central to appellants' constitutional claims when it denied the cross-motion to quash the subpoenas and granted the Attorney General's motion to enforce, and that appellants had a full and fair opportunity to litigate those issues in the state court.

Appellants argue that because their entire section 1983 claim was not before the state court, the issues decided were not "identical." However, Justice Greenfield denied the cross-motion after finding that the investigation did not "unnecessarily interfer[e] with First Amendment freedoms" and did not prevent "Mackey or the Temple from practicing their religious activity, nor is it disruptive to such activity." Justice Greenfield also found that there was "no basis" for concluding

that the Attorney General was acting in bad faith in pursuing the investigation of either Mackey or the Temple. These findings that the State defendants did not violate appellants' constitutional rights by issuing the subpoenas or pursuing the investigation thus bar appellants' conspiracy claim in the district court, since "[i]t is the wrongful act, not the conspiracy, which is actionable." *Singleton v. City of New York*, 632 F. 2d 185, 192 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981); *see United States v. Sacco*, No 90-1002 (2d Cir. March 11, 1991). Moreover, appellants had an opportunity to challenge those findings in the state court, but chose not to pursue an appeal. Under the circumstances, we will not consider their argument to us that the findings were based upon an inadequate record, which they were not allowed to develop.

Appellants also argue that collateral estoppel is inapplicable here because they had a right to trial by jury in the federal court whereras the state court determination was made by a judge. The Seventh Amendment, however, does not prevent the use of collateral estoppel in this context. *Cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 337 (1979). Moreover, under New York law, even though a party seeks to invoke his right to a jury trial in a subsequent civil proceeding, the party will be precluded from relitigating issues previously decided by a non-jury tribunal if that party had affirmatively sought the prior ruling. See *Stevenson v. Goomar*, 148 A.D. 2d 217, 219-20 & n.2 (3d Dept.), appeal dismissed, 74 N.Y. 2d. 945 (1989); cf. *Ryan v. New York Telephone Co.*, 62 N.Y. 2d. 494 (1984). Since appellants raised issues central to their constitutional claims by bringing the cross-motion to quash the subpoena in the state court, we believe that their right to a jury trial on these claims in the federal court does not bar the use of collateral estoppel under New York law.

In sum, we find that the district court correctly dismissed appellants' section 1983 claims on the basis of collateral estoppel. We therefore do not reach the alternate ground of qualified immunity relied on the the district court with respect to the State defendants. With regard to appellants' remaining claims, they apparently argue only that be-

cause the district court erred in applying collateral estoppel to the section 1983 claims, it erred in dismissing the other claims. However, we agree with the district court's dismissal under Fed. R. Civ. P. 12(b)(6) of appellants' section 1985(3) claims since they were couched in terms of conclusory allegations and failed to demonstrate "some racial, or perhaps otherwise class-based, invideous discriminatory animus behind the conspirators' action" as required by section 1985(3). *New York State National Org. for Women v. Terry*, 886 F 2d. 1339, 1358 (2d Cir. 1989), cert. denied, 110 S. Ct 2206 (1990). Given the absence of federal claims left to adjudicate, the district court properly dismissed the pendent state-law claims. *See Federman v. Empire Fire & Marine Ins. Co.*, 597 F. 2d 798, 809, (2d Cir. 1979).

The judgment of the district court is affirmed.

91-214

No. 91-

IN THE

Supreme Court of the United States

October Term, 1991

TEMPLE OF THE LOST SHEEP INC., a/k/a Action Committee to Help the Homeless Now, and HENRY JEROME MACKEY, a/k/a Jerome Mackey,

Petitioners,

- v. -

ROBERT ABRAMS, Attorney General of the State of New York, NEW YORK NEWS INC., JACK NEWFIELD, JOHN DAVIS, THOMAS WHELAN, and JILL LAURIE GOODMAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS NEW YORK NEWS INC. AND JACK NEWFIELD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 30, 1991

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QUESTION PRESENTED

Whether this Court should grant a Writ of Certiorari to review an order of the Court of Appeals affirming the dismissal of Petitioners' federal civil rights claims on the basis of collateral estoppel, where issues essential to Petitioners' federal claims were necessarily decided in a prior state court proceeding in which petitioners had a full and fair opportunity to litigate such issues, and where the district court had deferred to the state court by abstaining from exercising its jurisdiction under this Court's decision in *Younger v. Harris*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The parent company of respondent New York News Inc. (now known as Tribune New York Holdings Inc.) at all times relevant to this action is and was Tribune Company. Excluding its wholly-owned subsidiaries, the following are the corporate affiliates of New York News Inc.: Quebec and Ontario Paper Co.; Manicovagan Power Co.; Quebec & Ontario Recycling; QNO Recycling Inc.; Tribune N.Y. Properties; Tribune New York Holdings Inc.; Tribune Properties Inc.; Chicago Tribune Company; Tribune Broadcasting Co.; KPLA Inc.; GWB Productions; Tribune Broadcasting News Network Inc.; Tribune Entertainment Co.; Magic J Music Publishing; Tribune N.Y. Radio Inc.; Tribune Production Inc.; Tribune Regional Programming Inc.; WGN Continental Broadcasting Co.; WGN of California Inc.; WGN of Colorado Inc.; Sun Sentinel Col.; News and Sun Sentinel Co.; Sentinel Communications Co.; Daily Press Inc.; Chicago Relay Assn.; Chicago Tribune Newspaper Inc.; Chicago Tribune Press Service Inc.; WGMX Inc.; Tribune California Properties, Inc.; Chicago National League Ball Club Inc.; QNO Paper Co., Ltd.; Newspapers Readers Agency Inc.; The Daily Press Inc.; Hampton Roads Newspaper Inc.; Gold Coast Publications Inc.; Pennisula Newspapers Inc.; Pennisula Community Newspaper Inc.; Times Advocate Co.; Twin County Community Newspaper Inc.; Sun Belt Publishing Co.; Tribune Media Services Inc.; and Tribune National Marketing Co.

No. 91-

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TEMPLE OF THE LOST SHEEP INC., a/k/a Action Committee to Help the Homeless Now, and HENRY JEROME MACKEY, a/k/a Jerome Mackey,

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BRIEF OF RESPONDENTS NEW YORK NEWS INC. AND JACK NEWFIELD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Temple Of The Lost Sheep Inc., a/k/a Action Committee to Help the Homeless Now (the "Temple") and Petitioner *pro se* Henry Jerome Mackey, a/k/a/ Jerome Mackey ("Mackey") seek a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit affirming

the judgment of the United States District Court for the Eastern District of New York. *Temple of the Lost Sheep et al. v. Abrams et al.*, 930 F.2d 179 (2d Cir. 1991), and reprinted in Petitioners' Appendix I (hereinafter "App.") at 261-278. The courts below dismissed petitioners' federal constitutional claims on the grounds of collateral estoppel based on a prior related state court proceeding. The state court found petitioner had suffered no constitutional deprivation (App. at 135-136) and, therefore, the district court dismissed petitioners' claim that respondents conspired to violate petitioners' constitutional rights for failure to state a claim upon which relief may be granted, and dismissed petitioners' pendent state law claims for lack of subject matter jurisdiction. App. at 167-168.

The District Court applied the doctrine of collateral estoppel to bar petitioners' federal civil rights claims based on the New York Supreme Court's decision granting the State Attorney General's motion to compel compliance with subpoenas issued in connection with an administrative investigation. The state court adversely resolved issues central to petitioners' constitutional claims when it denied petitioners' cross motion to quash and granted the State Attorney General's motion to compel. In so doing, the state court necessarily determined that neither petitioners' First Amendment religious freedoms nor those guaranteed under the Fifth Amendment were being violated and that the State Attorney General was acting in good faith in connection with his investigation of petitioners. Petitioners had a full and fair opportunity to litigate their constitutional issues in state court, and actually raised those issues in support of their cross motion to quash the subpoenas. App. at 135-136; App. at 275-277. The District Court had abstained from exercising jurisdiction under *Younger v. Harris* while the state court proceeding was pending, and had advised petitioners that the outcome of the state court proceeding could resolve issues central to their federal claims. App. at 126-127.

PROCEDURAL HISTORY

Petitioners commenced this action by order to show cause on November 22, 1988 in the Eastern District of New York. Petitioners' primary allegation against respondents New York News Inc.[1] (then the publisher of the New York *Daily News*) and then *Daily News* columnist Jack Newfield (the "Daily News respondents") was that they "conspired" to further an illegal and unconstitutional investigation of petitioners by the New York State Attorney General, and that they published four news articles about petitioners in furtherance of the purported "conspiracy." App. at 33-34.

The Attorney General's investigation of petitioners began in October 1988, when the Attorney General issued investigative subpoenas to petitioners. Instead of responding to the subpoenas, petitioners made a motion in the District Court seeking, among other things, an injunction prohibiting the Attorney General from proceeding with his investigation of petitioners and an injunction requiring the *Daily News* to give "equal space" to petitioners in their publication. Following oral argument, those motions were summarily denied by the District Court (Raggi, J.) on December 6, 1988. App. at 157-163. Meanwhile, before any substantive proceedings had taken place in the District Court, the Attorney General commenced a state court proceeding to compel compliance with the subpoenas.

In January 1989, petitioners amended their complaint in an effort to avoid the *Younger* abstention doctrine. Nevertheless, on June 7, 1989, the District Court (Raggi, J.) issued an Order abstaining from exercising federal jurisdiction over petitioners'

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[1] New York News Inc. has changed its name and is now known as Tribune New York Holdings Inc. To avoid confusion, respondent is referred to herein by its former name.

federal claims, and staying the federal action pending the final outcome of the related state court proceeding. App. 106-128.

On January 4, 1990, the New York County Supreme Court issued its order granting the Attorney General's motion to compel petitioners' compliance with the subpoenas. App. 129-137. The court (Greenfield, J.) specifically rejected petitioners' defense based on their claim that their federal constitutional rights were being infringed by the Attorney General's investigation and found that the investigation was not being conducted in "bad faith." App. at 135. Petitioners then noticed an appeal from Justice Greenfield's decision. In an effort to "reactivate" the federal proceeding, however, petitioners withdrew their notice of appeal and allegedly complied with the subpoenas. Justice Greenfield's January 4, 1990 order thus became final for all purposes.

On April 13, 1990, the District Court granted petitioners' motion to vacate Judge Raggi's June 7, 1989 order staying the federal proceedings on the ground that the state court proceeding had then been concluded. On April 27, 1990, the Daily News respondents made a motion to dismiss petitioners' complaint and the District Court stayed all discovery pending its ruling thereon.

On September 26, 1990, the District Court granted defendants' motions to dismiss petitioners' complaint on the following grounds: the petitioners' claims arising under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendment rights were dismissed as barred by the doctrine of collateral estoppel based on the decisions of Judge Raggi and Justice Greenfield, and additionally, as to the Attorney General defendants, based upon qualified immunity. The petitioners' claims under 42 U.S.C. § 1985(3) were dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. The petitioners' pendent state law claims were

dismissed for lack of subject matter jurisdiction pursuant to the doctrine of *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Petitioners appealed the District Court's order dismissing its complaint to the United States Court of Appeals for the Second Circuit. Petitioners argued that their federal conspiracy claims were not and could not have been actually determined in the state court proceeding, and that they were denied a full and fair opportunity to litigate these claims in an impartial forum. On April 5, 1991, the Court of Appeals (Feinberg, Circuit Judge) unanimously affirmed the District Court judgment and held that petitioners were collaterally estopped from pursuing their claims in federal court based on the prior related state court judgment. App. at 276. The Court of Appeals held that, because petitioners consciously chose not to appeal the state court findings, they could not argue that those findings were based on an inadequate record. App. at 277.

STATEMENT OF FACTS

A detailed description of the factual background surrounding this action is succinctly set forth in the Second Circuit's opinion in *Temple of the Lost Sheep Inc. v. Abrams*, 930 F.2d 178 (2d Cir. 1991), found in Petitioners' Appendix I at 261. For the Court's convenience, a summary of the essential facts follows.

During the relevant time period, respondent New York News Inc. was the publisher of the *Daily News*, and respondent Jack Newfield ("Newfield") was a *Daily News* staff writer and a regular *Daily News* columnist. Petitioners are an alleged church and shelter for homeless men in Queens, New York (the "Temple") and its Director, Mr. Henry Jerome Mackey ("Mackey").

The defendants John Davis ("Davis") and Thomas Whelan ("Whelan") are homeless persons who were originally admitted to the Temple shelter in 1988, but who later resigned from the organization. Jill Laurie Goodman ("Goodman") is an Assistant Attorney General who, on behalf of the Attorney General of the State of New York ("Attorney General") issued subpoenas to be served on Mackey and others in support of an administrative investigation into their activities in connection with the Temple.

Petitioners allege that the Attorney General and his predecessor have led a concerted and ongoing conspiracy to deprive the Temple and Mackey of their constitutional rights for many years. Mackey was the subject of an investigation by the Attorney General when he ran a judo school in 1974 and a stereo tape distributorship in 1975. *See, e.g., United States v. Mackey*, No. 75 CR 468 (E.D.N.Y. 1975) (JBW) (convicting Mackey of mail fraud).

In 1988, defendants Davis and Whelan were admitted to the shelter, allegedly on the condition that they comply with the Temple's goals and rules. Thereafter, Whelan and Davis withdrew from the Temple and its shelter, and informed defendant Jack Newfield, then a staff writer for the *Daily News*, about Mr. Mackey, the Temple, and conditions at the Temple's shelter. Petitioners allege that Davis and Whelan told "lies" and "half-truths" to Newfield and to the Attorney General in retaliation for being ousted from the shelter. App. at 29-30. In this way, petitioners allege that Davis, Whelan, Newfield and the *Daily News* joined the Attorney General's purported conspiracy against Mackey and the Temple. App. at 31-32.

Thereafter, the Attorney General's Charities Bureau commenced an investigation and issued subpoenas to Mackey and other Temple members. Newfield, in his column for the *Daily News*, reported on Mackey and the Temple, and on the

issuance of subpoenas by the Attorney General to Mackey and other Temple members.

On December 6, 1988, the Attorney General moved in New York Supreme Court for an order requiring Mackey and the Temple to comply with these outstanding subpoenas. Mackey and the Temple cross-moved to dismiss the Attorney General's action and to quash the subpoenas as beyond the authority of the Attorney General and because they allegedly violated their constitutional rights. On January 4, 1990, the State Court granted the Attorney General's Motion to compel compliance with the subpoenas and denied petitioners' cross motion to quash. App. at 129-137.

Shortly thereafter, Newfield and the Daily News published additional newsworthy information about Mackey and the Temple which Mackey and the Temple also claim to be part of the continuing conspiracy to deprive them of their constitutional rights. App. at 49.

REASONS FOR DENYING THE WRIT

Petitioners have presented no issue warranting this Court's review of the decision below. Petitioners' constitutional argument (that the application of collateral estoppel is a denial of due process) was not raised in the courts below and is frivolous in any event. The Court of Appeals' decision does not conflict in any way with any decisions of this Court or with those of other Circuits. The Court of Appeals faithfully and correctly adhered to this Court's precedent governing abstention, reservation of federal claims, and the collateral effects of prior state court proceedings. The Writ should be denied.

SUMMARY OF ARGUMENT

Petitioners' federal civil rights claims are now barred by the doctrine of collateral estoppel. Petitioners' due process rights were not violated by precluding them from relitigating their civil rights claims in federal court because decisive issues were clearly raised and necessarily decided in a prior state court proceeding in which the petitioners had a full and fair opportunity to litigate these same issues. Moreover, petitioners had an opportunity to challenge the findings of the state court, but chose not to pursue their appeal. Therefore, petitioners cannot argue that the state court findings were biased or based on an inadequate record which it was not allowed to develop.

Furthermore, because the District Court declined to exercise jurisdiction in favor of a pending state court proceeding on the basis of *Younger* abstention, petitioners could not reserve their federal civil rights claims from state court adjudication. The Court of Appeals correctly found that the reservation of federal claims under the procedure described in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), is applicable only in *Pullman*, not *Younger* abstention situations.

The District Court properly dismissed petitioners' conspiracy claim pursuant to 42 U.S.C. §1985(3) for failure to state a claim upon which relief may be granted. Petitioners were properly precluded as a matter of law from pursuing their federal conspiracy claim in federal court because a prior state court judgment had already determined that the Attorney General was not acting in bad faith in his investigation of either Mackey or the Temple and that petitioners' constitutional rights had not been violated by anything respondents had done. Furthermore, the courts below properly held that petitioners' conclusory allegations of a purported conspiracy between the Attorney General and the *Daily News* lacked the requisite factual specificity and did not allege any class-based animus.

Finally, because petitioners were precluded as a matter of law from establishing the elements of their federal law claims, the Court of Appeals properly affirmed the District Court's dismissal of petitioners' pendent state law claims for lack of subject matter jurisdiction.

ARGUMENT

POINT I

THE WRIT SHOULD BE DENIED BECAUSE PETITIONERS' DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' FEDERAL CIVIL RIGHTS CLAIMS AS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL

Petitioners' due process rights were not violated or prejudiced when the District Court properly precluded relitigation of petitioners' federal civil rights claims in federal court, because the same issues were actually litigated and necessarily decided in a prior state court proceeding in which the petitioners had a full and fair opportunity to present their case.[2]

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[2] The Petition herein does not even cite, much less discuss, the three decisions of this Court which establish the controlling legal principles applied by the courts below. *Migra v. Warren City School District*, 465 U.S. 75 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980). Petitioners' quarrel with the application of settled legal principles to the particular facts of this case is not an issue this Court should entertain. To the extent petitioners rely on conflicting state and federal decisions which predate *Migra*, *Kremer* and *Allen*, those decisions are no longer good law.

After careful review of both Justice Greenfield's order and Judge Raggi's abstention decision, the District Court determined that petitioners had a full and fair opportunity to litigate in state court, and that they actually did litigate issues necessary to their federal claims, but failed to make any showing of constitutional violations by respondents. Therefore, dismissal of petitioners' claims pursuant to §1983 was warranted and required, and the Court of Appeals properly affirmed the District Court judgment.

Pursuant to 28 U.S.C. § 1738, a federal court must apply the rules of collateral estoppel of the state in which a prior judgment was rendered, when the same issues are later raised in a civil rights case in federal court. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *Allen v. McCurry*, 449 U.S. 90, 104 (1980). Under New York law, "the doctrine of collateral estoppel [issue preclusion] . . . precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, or those in privity, whether or not the tribunals or causes of action are the same." *Murphy v. Gallagher*, 761 F.2d 878, 881 (2d Cir. 1985), *quoting Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 500 (1984). The doctrine of collateral estoppel is fatal to petitioners' "attempt to relitigate claims already litigated and decided in state court. . . ." *Neustein v. Orbach*, 732 F. Supp. 333, 342 (E.D.N.Y. 1990), *citing Murphy*, *supra* at 879.

The Court below properly applied New York law on the issue of collateral estoppel. Under New York law, collateral estoppel applies here because two conditions have been met: first, the same issue necessarily was decided in the prior action and is decisive in the present action, and second, the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination. *Kaufman v. Eli Lilly and Co.*, 65 N.Y.2d 449, 455 (1985).

In a January 4, 1990 Order, the New York State Supreme Court rejected petitioners' constitutional defense in denying petitioners' cross-motion to quash the Attorney General's subpoenas. Under New York law, a subpoena duces tecum will be quashed upon a demonstration that compliance will infringe fundamental rights, such as those guaranteed by the First and Fourth Amendments. *Matter of Grand Jury Subpoenas*, 72 N.Y.2d 307, *cert. denied*, 488 U.S. 966 (1988); *Full Gospel Tabernacle, Inc. v. Attorney-General*, 142 A.D.2d 489 (3d Dep't 1988).

Justice Greenfield's order indicates that petitioners actually raised the decisive constitutional issues as a defense in the State Court proceeding. January 4 Order at 6-7: App. at 135-136. Moreover, petitioners' counsel's affidavit in opposition to the Attorney General's Motion to Compel and in support of petitioners' Motion to Quash explicitly argues that the same constitutional claims are at stake in both the federal and state actions.

> It would be impossible for this Court to compel compliance with those subpoenas if it is found that the Attorney General did in fact conspire to deprive respondents of their constitutional rights, and started his investigation, and instituted his subpoenas, in bad faith. The necessity for the Attorney General to show good faith, and that he did not issue the subpoenas in bad faith, is an indivisible part of showing that he did not further the conspiracy.

Affidavit of James Roberson, Jr., Esq., sworn to on December 19, 1988 (the "Roberson Aff.") ¶ 11: App. at 101; *see also* Roberson Aff. ¶10: App. at 100-101.

The state court specifically found "no basis for concluding that the Attorney General is acting in bad faith in pursuit of his

investigation of either Mackey or the Temple." Greenfield Order at 6: App. at 135. This finding alone precludes petitioners from establishing that any unlawful conspiracy existed.

The showing that petitioners would have to have made to quash the subpoenas on First Amendment grounds was described by the Appellate Division in *Full Gospel Tabernacle*, *supra*, as follows:

> The burden [is] on petitioners in the first instance to make at least *some* showing that the production of information would impair other First Amendment rights . . . Once such a showing is made, the prosecution has the burden of establishing that the infringement is outweighed by a compelling State interest, to which the information sought is substantially related, and that the State's ends may not be achieved by less restrictive means.

Full Gospel Tabernacle, 142 A.D.2d at 493 (emphasis added, citations omitted). The state court held that plaintiffs could not even meet this threshold burden:

> The investigation by the Attorney General herein is "designed to serve those interests without unnecessarily interfering with First Amendment Freedoms." *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 637 (1980). *It should be stressed that the investigation does not prevent Mackey or the Temple from practicing their religious activity, nor is it disruptive to such activity* . . . After reviewing the complaints of Mackey and the Temple in the District Court action and the papers submitted by them in this proceeding, this court finds *no basis for concluding that the Attorney General is acting in*

> *bad faith* in pursuit of his investigation of either Mackey or the Temple.

Greenfield Order at 6 (emphasis added): App. at 135.[3]

A determination that petitioners' constitutional rights were not violated by the Attorney General's investigation was necessary to Justice Greenfield's decision. Roberson Aff.: App. at 100-101. Moreover, such a determination was actually made. Greenfield Order at 6-7: App. at 135-36. Because the issues to be decided in the federal court action were identical to issues already necessarily decided by the state court, the first condition for collateral estoppel under New York law was undeniably satisfied.

Furthermore, petitioners cannot argue that they were denied a full and fair opportunity to litigate the federal constitutional issues in the state court proceeding. Petitioners had ample opportunity to prove their constitutional claims; first, in the District Court before Judge Raggi on their motion for a preliminary injunction, and second, in the state court before Justice Greenfield on their cross-motion to quash. Petitioners have repeatedly failed to make even a threshold showing of any constitutional deprivation.

The state court specifically held "that the District Court has deferred to this court to determine the various issues raised by Mackey and the Temple" (App. at 137), because "the state court could properly address the constitutional claims of respondents with respect to privacy, free association, freedom of religion and the right against self-incrimination." App. at 132.

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[3] Justice Greenfield also specifically found that the Attorney General's actions did not violate petitioners' Fifth Amendment rights. *Id.*

In opposing the subpoenas in State Court, petitioners argued that the Attorney General had to make a showing of a compelling State interest, that their First, Fourth, Fifth, and Fourteenth Amendment rights were violated, that compliance with the subpoenas violated their rights of privacy, freedom of association and religious belief, and that the Attorney General was engaged in a conspiracy to deny Mackey and the Temple their constitutional rights. It is therefore clear and obvious that petitioners had a full and fair opportunity to litigate these decisive constitutional issues.

More importantly, the State Court specifically rejected petitioners' argument that the Attorney General lacks the power to investigate them and that the investigation somehow violates petitioners' constitutional rights. *See* Greenfield Order at 7-8: App. at 136-37. Thus, even if the Daily News respondents had "conspired" with the Attorney General to cause the investigation into petitioners' activities, petitioners cannot possibly show any deprivation of their federal constitutional rights.

The preclusive effect of prior state court judgments upon federal civil rights actions is well recognized. In *Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486 (2d Cir.), *cert. denied*, 478 U.S. 1006 (1986), the Court of Appeals looked to New York law and affirmed the District Court's holding that plaintiff's § 1983 action was barred based on plaintiff's prior state court Article 78 proceeding which was abandoned prior to the filing of the federal suit. Despite plaintiff's contention that there had been no prior hearing on the issue, the Court stated:

> We apply the doctrine of *res judicata* to the facts of this case without regard to whether a hearing was actually granted in state court . . . [plaintiff] could have pressed the [§ 1983] issue in the Article 78 action, but chose instead to concentrate on getting a

> stay of the order to vacate. Plaintiff had a "full and fair opportunity" to litigate the claims brought here.

786 F.2d at 489. *See also Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

Furthermore, in *Bartel* the Court specifically recognized that "New York Courts look to whether a claim has been 'brought to a final conclusion,' not to whether a full evidentiary hearing has been held on the claims." *Bartel, supra, citing O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981) ("once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy").

In a case virtually identical to this one, *Sreter v. Hynes*, 419 F. Supp. 546 (E.D.N.Y. 1976), the District Court (Pratt, J.) held that federal plaintiffs who had previously sought unsuccessfully in state court to quash a subpoena issued by the Deputy Attorney-General of the State of New York were collaterally estopped from re-litigating civil rights claims in connection with that subpoena, whether or not such claims were actually argued in state court. *Id.* at 548. Furthermore, the Court noted that *Younger* abstention was appropriate and that the district court lacked jurisdiction to review state court determinations of federal constitutional questions. *See Tang v. Appellate Division of New York Supreme Court, First Dept.*, 487 F.2d 138, 141 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

Because petitioners' constitutional claims have already been determined against them, the doctrine of collateral estoppel bars relitigation of the federal law issues in this case and precludes the existence of a conspiracy to deprive petitioners of their constitutional rights. *Allen v. McCurry*, 449 U.S. 90, 104

(1980). Petitioners' due process argument was not raised below and has no merit whatsoever, because petitioners had adequate notice and a full and fair opportunity to litigate the decisive issues which the state court resolved against them. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317, 330 (1967). Accordingly, the Writ should be denied.[4]

POINT II

THE WRIT SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT UNDER *YOUNGER* ABSTENTION PETITIONERS COULD NOT RESERVE FEDERAL CLAIMS FROM STATE COURT ADJUDICATION

Petitioners claim to have preserved the right to federal court jurisdiction over their federal conspiracy claims pursuant to the doctrine of *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964).

The Court of Appeals properly determined that petitioners' reliance on *England* is misplaced because the procedures formulated in that case relate specifically to the abstention doctrine established by *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), not to the *Younger* doctrine upon which Judge Raggi abstained in this action. "Indeed, despite [petitioners'] argument to the contrary, the

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[4] The only decision of this Court cited in the Petition which remotely addresses the issues in this case is *Montana v. United States*, 440 U.S. 147 (1979). In *Montana*, however, this Court recognized that "[u]nder collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Id.* at 153. The opinion of the Court of Appeals does not conflict in any way with the holding in *Montana*.

decision in *England* itself makes clear that its intended application is only to *Pullman* abstention situations. *See* 375 U.S. at 415-16 and n.7." *Olitt v. Murphy*, 449 F. Supp. 322, 323-24 (S.D.N.Y. 1978).

Judge Raggi, in her June 7, 1989 Memorandum and Order, invoked the doctrine established in *Younger v. Harris*, 401 U.S. 37 (1971), when she abstained from exercising federal jurisdiction over petitioners' action until the state court proceeding came to a conclusion. Raggi Order pp. 15-22: App. at 120-127. *Younger* requires federal courts to dismiss or stay federal actions on the basis of consideration of equity, comity and federalism when there is a pending state proceeding in which the same federal claims can be raised. *Id.*; *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

Younger abstention is warranted when "(1)... there is an ongoing state proceeding; (2) ... an important state interest is involved; and (3) ... the federal plaintiff has an adequate opportunity for judicial review of his constitutional claims during or after the [state] proceeding." *Christ the King Regional High School v. Culvert*, 815 F.2d 219, 224 (2d Cir.), *cert. denied*, 484 U.S. 830 (1987). *See Neustein v. Orbach*, 732 F. Supp. 333 (E.D.N.Y. 1990). Judge Raggi found all three conditions for *Younger* abstention were met. Raggi Order at 15-17: App. at 120-22. Moreover, Judge Raggi found no evidence of bad faith on the part of the Attorney General to justify invoking the bad faith exception to *Younger* abstention. *See Dombrowski v. Pfister*, 380 U.S. 479 (1965). Judge Raggi held:

> There being no evidence of bad faith sufficient to excuse abstention and this court being convinced that plaintiffs can adequately raise their constitutional challenges to the Attorney General's conduct in pending state proceedings, this court abstains now from addressing those claims.

Raggi Order at 20: App. at 125.

In its abstention order the district court specifically cautioned that "[h]ow the state court rules with respect to the question of whether the Attorney General was involved in any conspiracy with the other named defendants - and if he was, whether their mutual objectives were unconstitutional - could, after all, have collateral estoppel effect in proceedings in this court, at least as against plaintiffs." Raggi Order at 20: App. at 125.

Petitioners did not then and cannot now dispute that they could and did raise their constitutional challenges to the Attorney General's investigation in the pending state proceeding. *See* Raggi Order at 17: App. at 122; Greenfield Order at 6-7: App. at 135-36. It is also indisputable that petitioners made an application by Order to Show Cause to preclude the state court from addressing their federal conspiracy claims which was summarily rejected by that court.[5] *See* Reply Affidavit of Henry Jerome Mackey, sworn to on March 29, 1990 ("Mackey Reply Aff."), ¶16, and Exhibit B attached thereto: App. at 207, 216-224. In his affidavit in support of such order to show cause, Mr. Mackey acknowledged that the state court's decision would have collateral estoppel effect in the pending federal suit. Mackey Reply Aff., Exhibit B: App. at 222, ¶ 3.

Nevertheless, petitioners contend that they somehow reserved the issue of conspiracy for federal determination under the doctrine of *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). Petitioners' reliance upon their purported *England* reservation is misplaced. *England* is

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[5] Judge Greenfield declined to sign appellant's Order to Show Cause and stated that the "Court will not be barred from considering whatever is appropriate for decision." Mackey Reply Aff., Exhibit B: App. at 216.

simply irrelevant when a federal court finds *Younger* abstention appropriate. *Olitt v. Murphy*, 453 F. Supp. 354, 358 (S.D.N.Y.), *aff'd w.o. opinion*, 591 F.2d 1331 (2d Cir. 1978), *cert. denied*, 444 U.S. 825 (1979) (purported *England* reservation ineffective in face of *Younger* abstention).

Only when a party is remitted to state court on abstention grounds for the purpose of resolving or clarifying an unsettled issue of state law under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), can it retain the right to return to the district court for a determination of his federal claims. Under *Pullman*, a federal court stays disposition of federal issues while remitting the litigant to state court to reach state issues as necessary to avoid deciding an issue of constitutional law or to avoid an erroneous determination of state law. To avoid being barred by a state decision on a federal claim, but also to insure that the entire controversy is presented to the state court, the Supreme Court in *England* adopted the following procedure for *Pullman* cases: a party may preserve his federal law claims by presenting the whole case to the state court and informing it that the party intends to return to federal court for final disposition of federal claims should the state court rule against him. *England* at 421-422.

However, when a state proceeding is pending and the *Younger*, not *Pullman*, abstention doctrine applies, all claims, both state and federal constitutional claims are to be presented to the state court. *Gibson v. Berryhill*, 411 U.S. 564 (1973). Furthermore, "under the *Younger* doctrine, a would-be federal plaintiff is required to exhaust all state appellate remedies before seeking federal court relief and the state proceeding is deemed pending until such time." *Olitt v. Murphy*, 449 F. Supp. 322 (S.D.N.Y. 1978), *citing Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-11 (1975).

Petitioners were required to present their federal constitutional claims in the state proceedings.[6] In fact, they did present them and decisive issues were finally determined against petitioners, notwithstanding their purported *England* reservation. Petitioners' reliance on *England* is misplaced and their purported *England* reservation is of no effect. *Olitt v. Murphy*, 453 F. Supp. 354, 358 (S.D.N.Y.), *aff'd w.o. opinion*, 591 F.2d 1331 (2d Cir. 1978), *cert. denied*, 44 U.S. 825 (1979). Accordingly, the petition for certiorari should be denied.

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[6] Even though appellants had no right to return to the District Court to relitigate their federal claims (because decisive issues were decided against them in the state court), this Court retained appellate jurisdiction over any federal issues decided by the state court. *Burford v. Sun Oil Co.*, 319 U.S. 315, 319 (1943). Appellants, however, voluntarily withdrew their state court appeal, despite full knowledge of its possible collateral estoppel effects.

CONCLUSION

For all the reasons set forth above, petitioners have presented no persuasive reason for this Court to review the unanimous decision of the Court of Appeals. The Writ should be denied.

Respectfully submitted

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